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In the Supreme Court of the United States

OCTOBER TERM, 1987

UNITED STATES OF AMERICA, PETITIONER

v.

RAY C. BROCE AND BROCE CONSTRUCTION CO., INC.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 86-2166 and 86-2202 (D. Kansas)
(D.C. Nos. 81-20119-01 and 82-20011-01)

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

RAY C. BROCE AND RAY C. BROCE CONSTRUCTION CO., INC., DEFENDANTS-APPELLEES

[Filed: Aug. 18, 1987]

ORDER AND JUDGMENT

Before: LOGAN, BARRETT, and TIMBERS, Circuit Judges.*

This is an appeal from the district court's judgment on remand following this court's en banc decision in *United States v. Broce*, 781 F.2d 792 (10th Cir. 1986). On remand, after reviewing the factual record, the district court held that the two indictments returned against defendants Ray C. Broce and Broce Construction Company, Inc. charged different aspects of the same conspiracy to restrain competition in violation of § 1 of the Sherman Act, 15 U.S.C. § 1. Accordingly, the district court vacated the judgment and sentence entered against both defendants on the second indictment.

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*The Honorable William H. Timbers, Senior United States Circuit Judge for the Second Circuit, sitting by designation.

On appeal, the government first challenges this court's earlier en banc determination that defendant's guilty plea did not bar consideration of the constitutionality of their sentences under the Double Jeopardy Clause. *Broce*, 781 F.2d at 798. The Supreme Court's recent decision in *Ricketts v. Adamson*, 55 U.S.L.W. 4914 (U.S. June 22, 1987), made it clear that a criminal defendant may voluntarily waive his double jeopardy protection. *Id.* at 4916 ("an agreement specifying that charges may be *reinstated* given certain circumstances is . . . *precisely* equivalent to an agreement waiving a double jeopardy defense"). Although *Ricketts* invalidates the broader rationale underlying the plurality opinion in *Broce*, that the double jeopardy prohibition "does not constitute an individual right which is subject to waiver," 781 F.2d at 795, it does not affect its narrower holding, based on clear Supreme Court precedent, that a guilty plea does not itself constitute a waiver of double jeopardy protection. *Id.* at 796-97; *see also Menna v. New York*, 423 U.S. 61, 62-63 & n.2 (1975) (guilty plea is merely an admission of factual guilt, which does not bar a claim that the state may not constitutionally prosecute the defendant no matter how validly his factual guilt is established); *Blackledge v. Perry*, 417 U.S. 21, 29-31 (1974). To the extent that the government's first argument may be read as requesting reconsideration of the court's en banc disposition, we will not do so. 10th Cir. R. 35.6.

The government next argues that the district court's factual finding that both indictments charged a single conspiracy was clearly erroneous. We have examined the record carefully and we are satisfied that the district court's decision was not clearly erroneous. *Cf. United*

States v. Beachner Construction Co., 729 F.2d 1278, 1281-83 (10th Cir. 1984).

AFFIRMED.

Entered for the Court
/s/ JAMES K. LOGAN
James K. Logan
Circuit Judge

Nos. 86-2166 and 86-2202

UNITED STATES OF AMERICA

v.

RAY C. BROCE and BROCE CONSTRUCTION CO., INC.

BARRETT, Senior Circuit Judge, dissenting:

I respectfully dissent, consistent with my dissenting views expressed in *United States v. Broce*, 781 F.2d 792 (10th Cir. 1986) (En Banc).

I believe that the indictments clearly charged two separate conspiracies. The majority opinion in our *en banc* consideration held that this was a fact question. The trial court, on remand, obviously believed that our *en banc* opinion commanded a finding of a single, continuing conspiracy contrary to the trial court's initial determination. In my view, the district court erred.

If the indictments charged two separate conspiracies to rig bids, as I believe, then the later *factual* determination made in *Beachner II*, based on evidence adduced, that the same bid rigging enterprise constituted but one conspiracy, should have no bearing in this case.

The defendants voluntarily, with advice of competent counsel, entered guilty pleas to charges alleging the existence of separate conspiracies. By so pleading, the defendants admitted that in fact two separate conspiracies existed. The defendants thus were not entitled to rely on an interpretation of facts adduced in a subsequent bid rigging case which led to the court's finding (Beachner II) that the scheme involved only one ongoing, continuing conspiracy.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

No. 81-20119-01

UNITED STATES OF AMERICA, PLAINTIFF,

v.

BROCE CONSTRUCTION CO., INC., RAY C. BROCE, AND GERALD R. GUMM, DEFENDANTS.

No. 82-20011-01

UNITED STATES OF AMERICA, PLAINTIFF,

v.

RAY C. BROCE, AND BROCE CONSTRUCTION CO., INC., DEFENDANTS.

[Filed: June 30, 1986]

MEMORANDUM AND ORDER

This matter comes before the court on remand from the Tenth Circuit Court of Appeals. We have been directed to make further factual findings before once again ruling on defendants' motion, pursuant to Fed. R. Crim. P. 35(a), to vacate the judgment and sentence of the court entered in Case No. 82-20011-01. Before engaging in such further finding of fact, we find it useful to recount the procedural history of this action.

The events material to the pending motion began on November 17, 1981, when defendants Ray C. Broce and Broce Construction Co., Inc., were charged in Case No.

81-20119-01 with conspiring to rig bids on a highway construction project in Meade County, Kansas—in violation of section 1 of the Sherman Act, 15 U.S.C. §1. On February 4, 1982, the same two defendants were charged in a separate indictment (Case No. 82-20011-01) with conspiring to rig bids on a highway construction project in Barton County, Kansas—again in violation of section 1 of the Sherman Act. Four days later, and pursuant to plea agreements, defendants entered unconditional guilty pleas to both indictments. On March 15, 1982, we imposed the following sentences on the various Sherman Act violations: (1) as to defendant Broce Construction Co., Inc., a $750,000.00 fine under each indictment, for a total fine of $1,500,000.00, and (2) as to defendant Ray C. Broce, a $50,000.00 fine and two years imprisonment under each indictment (with the two 2-year prison terms to run concurrently), for a total fine of $100,000.00.

Meanwhile, a case involving other Kansas highway construction contractors alleged to have engaged in similar Sherman Act violations had been pending in this court before Judge Saffels. (*Beachner I*) On May 7, 1982, a jury acquitted both Beachner Construction Co., Inc., and its secretary-treasurer on charges that they had violated section 1 of the Sherman Act. Subsequently, Beachner Construction Co., Inc., and the vice-president of that corporation were indicted for Sherman Act violations based on alleged bid rigging in connection with other highway construction projects. (*Beachner II*) Beachner Construction Co., Inc., then moved for dismissal as to it of that second indictment on the ground of double jeopardy.

After a three-day evidentiary hearing, Judge Saffels found that the various instances of bid rigging alleged in the two *Beachner* indictments were merely separate incidents within a single, larger conspiracy to suppress and eliminate competition among highway construction contractors within the state of Kansas. Accordingly, Judge

Saffels concluded that the prosecution of Beachner Construction Co., Inc., under the indictment returned in *Beachner II* would violate the double jeopardy provision of the fifth amendment. Beachner Construction Co., Inc.'s, motion to dismiss that second indictment was therefore granted. *United States v. Beachner Construction Co., Inc.*, 555 F.Supp. 1273 (D. Kan. 1983).

On February 22, 1983, shortly after Judge Saffels had entered his dismissal order in *Beachner II*, defendants in the instant action filed the pending Rule 35(a) motion to vacate the judgment and sentence entered in Case No. 82-20011-01. Citing Judge Saffels' finding that each incident of bid rigging on Kansas highway construction projects during the relevant time period had been pursuant to a single conspiracy to restrain competition, defendants argued that their conviction on both indictments (although entered after guilty pleas) was in violation of the double jeopardy clause. To assist us in ruling on defendants' motion, the parties stipulated that we could consider the factual record made in the *Beachner II* evidentiary hearing before Judge Saffels.

In an unpublished Memorandum and Order of November 18, 1983, we denied defendants' motion to vacate the judgment and sentence entered in Case No. 82-20011-01. Said denial was based on our conclusion that a guilty plea acts as a waiver of a defendant's double jeopardy defense—at least where a second indictment, *on its face*, charges a different offense. *See Menna v. New York*, 423 U.S. 61, 62-63 n.2 (1975) (per curiam). We specifically found that the two indictments at issue in this case did, on their faces, charge different conspiracies to restrain competition. Because defendants, through their guilty pleas, were deemed to have admitted all allegations contained in the two indictments, we saw no need to address the question considered by Judge Saffels in *Beachner II* (i.e., whether the incidents alleged in the two indictments were *in fact* part of a single conspiracy).

On March 22, 1984, a panel of the Tenth Circuit affirmed Judge Saffels' *Beachner II* decision dismissing the second indictment against Beachner Construction Co., Inc. That affirmance was based on the panel's conclusion that the finding of a single conspiracy to restrain competition was not clearly erroneous. *United States v. Beachner Construction Co., Inc.*, 729 F.2d 1278, 1282 (10th Cir. 1984).

On appeal, a panel of the Tenth Circuit reversed our order denying defendants' Rule 35(a) motion to vacate the judgment and sentence entered in Case No. 82-20011-01. *United States v. Broce*, 753 F.2d 811 (10th Cir. 1985). In a split decision, the panel held that defendants' guilty pleas did not effectively waive their right to rely on the defense of double jeopardy and that, moreover, the two indictments were not *facially* inconsistent with the view that they charged but a single conspiracy. Adopting Judge Saffels' findings of fact in *Beachner II*, the panel went on to conclude that the indictments were *factually* based on the same conspiracy. Accordingly, the panel ordered that defendants' motion be granted and that the judgment and sentence entered against them in Case No. 82-20011-01 be vacated.

The Tenth Circuit subsequently vacated the panel decision and granted rehearing en banc. In a decision of January 2, 1986, the full Court of Appeals ordered our decision vacated, but then remanded the matter to us for a factual determination as to whether the two indictments actually charged only a single conspiracy. *United States v. Broce*, 781 F.2d 792 (10th Cir. 1986) (en banc).

Of the seven active judges on the Tenth Circuit at the time of the en banc decision, five chose to write opinions. The plurality opinion (authored by Judge Moore and joined in by Chief Judge Holloway and Judge Logan) and the two concurring opinions (by Judges McKay and Seymour) all agreed that defendants had not waived their

double jeopardy defense by pleading guilty to both indictments. In separate opinions, Judges Barrett and Doyle dissented on that issue. The plurality and concurring opinions further agreed that the two indictments were—on their faces—not inconsistent with a finding that they charged but a single conspiracy. Again, Judges Barrett and Doyle disagreed—finding that the two indictments charged facially distinct conspiracies.

The Tenth Circuit judges were even more divided on the question of whether the two indictments charged *factually* distinct conspiracies. Although expressing some doubt as to whether the two alleged conspiracies were in fact distinct, the plurality chose to remand the case to this court for an initial answer to that factual question. *Id.*, 781 F.2d at 797-98. Judge McKay expressed less interest in the factual question—noting that the vagueness of the two indictments should be construed against the government. Nonetheless, because he had "no objection to joining and giving the trial court the first opportunity to review the issue," *id.*, 781 F.2d at 799, he joined in the decision to remand. Judge Seymour, on the other hand, opposed the decision to remand. In her view, the stipulated incorporation of Judge Saffels' *Beachner II* findings into the record of this case entitled such findings to "full preclusive effect." 781 F.2d at 792. She thus concluded that, as a matter of law, the two indictments returned against these defendants were factually based on the same conspiracy. In dissent, Judge Barrett agreed that the *Beachner II* findings would ordinarily be entitled to preclusive effect; but he opposed application of that doctrine here because defendants had entered their guilty pleas *before* Judge Saffels made his *Beachner II* findings. *Id.*, 781 F.2d at 810-11. Judge Doyle stood alone in concluding that the two indictments did, in fact, charge different conspiracies. *Id.*, 781 F.2d at 823.

Our task on remand was spelled out by Judge Moore in his plurality opinion. That opinion noted that "the question of whether the indictments charged one or two conspiracies is, in the context of this case, wholly factual." 781 F.2d at 797. Accordingly, the case was "remanded for a factual determination *on only the evidence originally presented upon the filing of defendants' motions,* including the stipulation between the parties." 781 F.2d at 798 (emphasis added). Because the record on remand was thus limited, we ordered the issue submitted on the briefs of the parties—without a further evidentiary hearing. Both the government and defendants have submitted memoranda of law, and we are now prepared to rule.

Throughout the consideration of defendants' Rule 35(a) motion, three issues have predominated. First, did defendants' guilty pleas to the two indictments constitute a waiver of their double jeopardy defense? Second, did the two indictments, on their faces, charge separate conspiracies? And, third, did the two indictments, as a factual matter, charge separate conspiracies? At this point, the first two issues have been definitively resolved. The guilty pleas have been held *not* to have waived defendants' double-jeopardy defense. And the two indictments have been held, if not facially in violation of the double jeopardy clause, then at least sufficiently vague to permit a resort to the underlying facts to determine whether such a violation has occurred.

The only issue remaining for resolution, then, is whether the two indictments returned against these defendants charge *factually* distinct conspiracies. As explained above, our original disposition of defendants' motion made it unnecessary for us to consider this factual question. We thus have yet to address the effect of Judge Saffels' *Beachner II* findings on the resolution of this issue. It is to those findings that we now turn our attention.

In his *Beachner II* Memorandum and Order, Judge Saffels noted at least six factors in support of his finding that the various bid rigging episodes in the Kansas highway construction industry were part of a single conspiracy to restrain competition—continuing as late as the incidents underlying these two indictments. First, Judge Saffels found that the construction contractors active in the state during that period had a "common objective." *See United States v. Wilshire Oil Co. of Texas*, 427 F.2d 969, 976 (10th Cir.), *cert. denied*, 400 U.S. 829 (1970). That objective was to eliminate competition among the state's contractors—an objective that had not changed "for nearly a quarter century." *Beachner II*, 555 F.Supp. at 1279.

Second, Judge Saffels noted that the separate bid riggings had been effected through a "common method." That is, a contractor wishing to obtain a particular contract would ask other contractors either to refrain from bidding on that project or, in some cases, to submit a "complementary bid." Such bids, always somewhat higher than the bid of the contractor to whom it was agreed the contract would go, were designed to convince the state that competitive bidding had taken place. In return for submitting a complementary bid, a contractor could expect other contractors to submit such bids on a later project as to which the conspirators had agreed that the first contractor would be the low bidder. *Id.*, 555 F.Supp. at 1277-78.

Third, the conspiring contractors used and understood "common jargon." As found by Judge Saffels, in addition to "complementary bid" (also called "comp bid"), the contractors referred to the process of negotiating for complementary bids as "setting-up" a job. They also referred to a contractor's acquiescence in the bid rigging process as a decision to "go along." *Id.*, 555 F.Supp. at 1277.

Judge Saffels' fourth factor grew, in part, from the contractor's use of common jargon. That is, "none of the [contractors] expressed any fear or concern that approaching a

fellow contractor about this illegal activity would result in their being reported to the authorities." *Id.* The contractors thus exercised little or no precautions when "setting-up" a job. As a matter of self-preservation, one who attempts to initiate a new conspiracy to violate the antitrust laws generally proceeds with caution for fear that the competitor to whom he broaches the idea will inform the authorities of the scheme. As Judge Saffels noted, the absence of such expected precautions in this context clearly suggests that the contractors were *not* initiating a new conspiracy each time the state asked for bids on a new project.

Fifth, Judge Saffels characterized the process of requesting and submitting complementary bids as the creation of "mutual and interdependent obligations . . . among contractors who participated in 'set-up' jobs." *Id.*, 555 F.Supp. at 1278. Of the factors cited by Judge Saffels, this is perhaps the most persuasive. To label the negotiations relating to each construction project as a separate conspiracy would suggest that some contractors conspired to *lose* what might otherwise have been a profitable contract. Only by considering the various contracts as interrelated parts of a single conspiracy can one explain why contractors would intentionally forego the right to submit a competitive bid on a particular project.

Finally, the sixth factor cited by Judge Saffels was his finding that "[t]he conspiracy was continuously present and could be 'plugged into' at any time." *Id.* Judge Saffels conceded that a number of projects were bid competitively—usually when out-of-state or other unwilling contractors were bidding, or when the letting occurred during a slow period for the construction industry. Nonetheless, when road construction contracts were more plentiful and all potential bidders were willing to invoke the standard procedures for "setting-up" a contract, the continuing existence of the conspiracy made collusion possible.

In conjunction with its brief on remand, the government has submitted a number of exhibits. Our examination of those exhibits, as well as our consideration of the arguments raised in the government's brief, fails to convince us that Judge Saffels' *Beachner II* findings should be rejected. We thus adopt those factual findings for purposes of defendants' Rule 35(a) motion.

Because the two indictments returned against these defendants charge simply different aspects of the same conspiracy to restrain competition, we conclude that the defendants' conviction under both indictments (even though obtained through guilty pleas) constituted a violation of their rights under the double jeopardy clause of the fifth amendment. Pursuant, therefore, to Fed. R. Crim. P. 35(a), we will vacate the judgment and sentence entered against both defendants on the indictment in Case No. 82-20011-01. The government's request for resentencing in Case No. 81-20119-01 will be denied.

IT IS THEREFORE ORDERED that the judgment and sentence entered against defendants Broce Construction Co., Inc., and Ray C. Broce in Case No. 82-20011-01 are hereby vacated. The judgment and sentence entered against both defendants in Case No. 81-20119-01 shall stand.

Dated this 30th day of June, 1986, at Kansas City, Kansas.

/s/ EARL E. O'CONNOR
Earl E. O'Connor, Chief
Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 83-2558
83-2559

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

RAY C. BROCE AND BROCE CONSTRUCTION CO., INC.,
DEFENDANTS-APPELLANTS

Appeal From the United States District Court
for the District of Kansas
(D.C. Nos. 82-20011-01 and 81-20119-01)

[Filed: Jan. 2, 1986]

ON REHEARING EN BANC

Before: HOLLOWAY, Chief Judge, DOYLE, BARRETT, McKAY, LOGAN, SEYMOUR, and MOORE, Circuit Judges.

MOORE, Circuit Judge.

These cases are before the court for rehearing *en banc*. The questions presented are whether a plea of guilty constitutes a waiver of a defendant's right to assert a violation of the Double Jeopardy Clause of the Fifth Amendment and whether the second of two indictments charging a Sherman Act conspiracy is duplicitous of the first. We

hold that a guilty plea does not waive the defense of double jeopardy under the circumstances of this case. We further hold the record requires a remand of this case for a hearing to determine as a matter of fact whether the acts charged constituted one or two conspiracies. We therefore reverse the judgment of the district court.

On November 7, 1981, a two count indictment was returned charging defendants, Ray C. Broce and Broce Construction Co., Inc., with conspiracy to violate the Sherman Act, 15 U.S.C. §1. In the second count, Mr. Broce was charged with mail fraud, 18 U.S.C. § 1341. On February 4, 1982, a second indictment was returned charging Mr. Broce and the corporation in one count with violation of 15 U.S.C. § 1.

On February 8, 1982, pursuant to a plea agreement between the government and the two defendants, Mr. Broce appeared and entered pleas of guilty to both indictments in his own behalf and as president of the corporation. Subsequently, Broce was sentenced to concurrent two-year terms and fined $50,000 on the conspiracy counts of both indictments. The corporation was fined $750,000 on each indictment.

One year later, both defendants filed motions pursuant to Fed. R. Crim. P. 35(a) to vacate the judgments alleging their conviction on the second indictment violated the Double Jeopardy Clause of the Fifth Amendment. The defendants asserted the conspiracy counts charged a single transaction rather than two separate conspiracies; hence, the second charge was unconstitutionally duplicitous and void. This contention was motivated by a ruling from another judge in the same district dismissing an indictment in a companion case.

The defendants, Broce and the Broce Construction Company, were actively engaged in the highway construction business in the state of Kansas for a number of years prior to the indictments. Indeed, these indictments grew

out of that very activity, as did the indictment in the companion case, *United States v. Beachner Construction Co., Inc.*, 555 F. Supp. 1273 (D. Kan. 1983). In *Beachner*, as here, the defendants had been indicted on a charge of conspiracy to rig bids on a particular Kansas highway project. After trial and acquittal on this charge, the defendants were again indicated on a second conspiracy charge connected to a different highway project. *Id.* at 1274. Prior to trial, the defendants moved to dismiss the indictment on double jeopardy grounds. After a three-day evidentiary hearing pursuant to *Abney v. United States*, 431 U.S. 651 (1977), the trial court concluded there had been a pervasive conspiracy to rig bids in the Kansas highway construction industry that had existed for "in excess of twenty-five years." *Beachner, supra,* at 1277. Accordingly, the court dismissed the indictment and the government appealed. The ruling was affirmed by this court. *United States v. Beachner Construction Co., Inc.*, 729 F.2d 1278 (10th Cir. 1984).

The hearing from which the present appeal emanates occurred after the *Beachner* appeal but before our affirmance of the dismissal. In order to focus the issue in this case, Broce and the government stipulated that the record of the *Beachner* hearing could be considered by the trial court in ruling on appellants' Rule 35 motion. That record is also before us. Following the hearing, and before the publication of our opinion in *Beachner*, the trial court denied relief, holding as a matter of law, the defendants had waived their right to raise the double jeopardy issue by their guilty pleas. This appeal followed.

The panel which originally heard this case ordered reversal of the trial court's judgment. *United States v. Broce,* 753 F.2d 811 (10th Cir. 1985). That opinion was vacated and rehearing was granted to consider whether the guilty pleas are admissions by the defendants that there were actually two conspiracies and whether the defendants

could collaterally attack the foundations of an indictment following a plea of guilty.

I.

The government contends a fundamental principle in this circuit is that the double jeopardy defense is personal and subject to waiver. *Cox v. Crouse*, 376 F.2d 824 (10th Cir.), *cert. denied*, 389 U.S. 865 (1967); *Caballero v. Hudspeth*, 114 F.2d 545 (10th Cir. 1940). On that premise the government argues that an unconditional plea of guilty constitutes that waiver, *Caballero, supra,* and precludes a challenge of the indictment. Although the panel held that *Menna v. New York*, 423 U.S. 61 (1975), and *Blackledge v. Perry*, 417 U.S. 21 (1974), compel a reversal of *Cabellero*, the government takes issue with this result. The government further postulates allowing a collateral attack will encourage defendants to challenge their sentences "long after their guilty pleas are entered, thus undermining the finality of convictions and increasing the already heavy workload of the federal courts."

These contentions were considered and rejected in *Blackledge, supra.*[1] There, in response to an argument that a due process claim could not be asserted following a guilty plea, the Supreme Court stated when the claim of constitutionality goes to "the very power of the State to bring the defendant into court to answer the charge," a guilty plea does not waive the constitutional issue. *Blackledge*, 417 U.S. at 30.

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[1] The government seeks to avoid the implication of *Blackledge* with the argument *Blackledge* is a due process and not a double jeopardy case. While that statement is true, it does not negate the clear impact the case has upon collateral attack following guilty pleas. This impact is the same whether the complaint is grounded in due process or double jeopardy when the right asserted goes to the government's power to file charges. *Blackledge, supra.*

The essential right with which the court dealt in *Blackledge* and with which we are concerned here is the "right not to be haled into court at all." *Blackledge*, 417 U.S. at 30. Indeed, as the court noted in *Robinson v. Neil:*

> The guarantee against double jeopardy is significantly different . . . . While this guarantee, like the others, is a constitutional right of the criminal defendant, its practical result *is to prevent a trial from taking place at all* . . . .

409 U.S. 505, 509 (1973) (emphasis added).

This is the first occasion we have had to reconsider the nature of the double jeopardy right and its effect on a guilty plea since *Blackledge* and *Menna.*[2] The present opportunity convinces us our previous holding in *Caballero* is no longer apposite. As already noted in *Menna, supra,* and *Robinson, supra,* the Fifth Amendment's Double Jeopardy Clause stands as an inhibition upon the government's right to institute charges. This inhibition is absolute, and even though the bar works as a protection of individuals, it does not constitute an individual right which is subject to waiver. If the absence of constitutional authority prevents the government from instituting charges in the first instance, a defendant's guilty plea cannot confer authority upon the government to do what the Constitution prohibits. In light of this fundamental constitutional concept, the doctrine of waiver has no significance.[3]

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[2] The question was raised but not dealt with in *Bromley v. Crisp*, 561 F.2d 1351 (10th Cir. 1977), *cert. denied,* 435 U.S. 908 (1978).

[3] The government argues our holding in *United States v. Rich*, 589 F.2d 1025 (10th Cir. 1978) decided after *Blackledge* and *Menna* indicates our adherence to the concept of waiver despite the assertion of a constitutional defect. The government urges the panel ignored the established law in the circuit. That argument is based upon an overbroad reading of *Rich*, for that case did not deal with the Double Jeopardy Clause in the context presented here. Additionally, the pre-*Blackledge* cases from this circuit relied upon by the government

Hence, the Broce guilty pleas do not constitute a bar to questioning whether the Double Jeopardy Clause prohibits the institution of the second indictment and vitiates those very pleas. It also follows that if the institution of the charge under attack is constitutionally defective, it is not a significant concern that collateral attack affects the finality of the judgment. If the charge upon which the judgment is based is constitutionally infirm, either on due process or double jeopardy grounds, that judgment cannot be "final." *Cf. Haring v. Prosise,* __U.S.__, 103 S.Ct. 2424 (1983).

The government argues that "almost every other court of appeals that has considered the issue [of waiver] since *Blackledge* and *Menna* has held that double jeopardy is a personal defense that is waived by a guilty plea where, as here, the plea is the result of a plea bargain." This argument is not well-founded. Examination of the cases cited in support of the government's proposition discloses neither *Blackledge* nor *Menna* were considered. *See United States v. Solomon*, 726 F.2d 677 (11th Cir. 1984); *United States v. Herzog*, 644 F.2d 713 (8th Cir.), *cert. denied*, 451 U.S. 1018 (1981); *Brown v. State*, 618 F.2d 1057 (4th Cir.), *cert. denied, sub nom. Brown v. Maryland*, 449 U.S. 878 (1980); and *United States v. Perez*, 565 F.2d 1227 (2d Cir. 1977).

In addition, the government suggests allowing the defendants to challenge their pleas is both inconsistent

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are equally inapposite. *See Brace v. Zerbst,* 93 F.2d 8 (10th Cir. 1937); *Cox v. Crouse*, 376 F.2d 824 (10th Cir.), *cert denied,* 389 U.S. 865 (1967). The government also cites *United States v. Bascaro*, 742 F.2d 1335 (11th Cir.), *cert. denied,* __U.S.__, 105 S.Ct. 3476 (1985), as a "waiver" case. Examination shows, however, the "waiver" was a failure to preserve the issue for appeal by failing to raise it in the trial court. The reliance is misplaced.

and inequitable. In reliance upon *Kerrigan v. United States,* 644 F.2d 47 (1st Cir. 1981), the government argues a defendant who pled guilty cannot be permitted to make arguments "inconsistent with the factual and theoretical foundations of the indictment." On this premise, the government contends *Kerrigan* supports the government's waiver theory. Yet, in discussing the issue of the defendant's waiver, the *Kerrigan* court did not consider *Blackledge* or its effect on the issue. Since *Blackledge* is the keystone in the issue of waiver under consideration here, *Kerrigan* cannot be regarded as persuasive authority.[4] Accordingly, the cardinal principle that the government's authority to charge is not subject to waiver by the accused has not been undercut since *Blackledge* and must remain the principle by which we are guided here.

Contrary to the government's insistence upon equity, the defendants' plea bargain cannot work an estoppel of their right to assert the invalidity of the charge. When the government enters into an agreement which is fashioned upon a constitutionally infirm charge, it cannot be heard to claim equity prohibits the defendants from raising the fundamental infirmity of the charging power. The government argues that because adherence to the plea agreement required it to forsake the possibility of instituting additional conspiracy charges in another district, it would be unfair to allow the defendants to obtain the benefits of the plea bargain and avoid the detriments. This argument overlooks that the government was without power to institute one of the charges upon which the plea agreement was based. In effect, that agreement was partially founded upon a nullity. As a matter of immutable principle, the government's constitutional inability to charge in the first

[4] Moreover, careful reading discloses the *Kerrigan* district court did not rule on the question of waiver; hence, the discussion of that topic by the circuit court is dictum.

instance is not diminished simply because it bargained away a prosecutorial advantage. The fundamental right not to be haled into court cannot be compromised on such grounds.

The government has also argued the defendants' pleas of guilty must be considered admissions of all the facts alleged in the indictments; therefore, they cannot contest the validity of the second charge. The prosecution contends that the indictments effectively alleged the existence of two conspiracies; therefore, having admitted that allegation by their pleas of guilty, the defendants cannot be heard to contend there was only one conspiracy in fact. *United States v. Kerrigan, supra.* The argument is unpersuasive. First, as distinguished from *Kerrigan*, the present indictments did not specifically allege separate conspiracies. While the second indictment alleged a conspiracy to rig bids on particular highway projects, it contained no specific charge that the conspiracy itself was separate from the conspiracy alleged in the first indictment. Second, the admissions of factual guilt subsumed in the pleas of guilty go only to the acts constituting the conspiracy and not to whether one or more conspiracies existed. *Launius v. United States*, 575 F.2d 770 (9th Cir. 1978).

Accordingly, we now hold, as mandated by *Menna*, a defendant's plea of guilty to a constitutionally duplicitous charge is not a waiver of that defendant's right to assert a double jeopardy claim. While there have been many cases which have held to the contrary, none of those have dealt with what *Blackledge* has characterized as the right not to be haled into court and what we recognize as the government's lack of constitutional power to charge. We find ourselves aligned with the Ninth Circuit in *Launius* and give full cognizance to the true nature of the double jeopardy right.[5]

[5] *See also United States v. Broussard,* 645 F.2d 504 (5th Cir. 1981).

II.

The remaining question is whether the indictments to which the defendants pled charged one or two Sherman Act conspiracies. As in *Beachner, supra,* a detailed paragraph by paragraph comparison of the two Broce indictments reveals their virtual identity except for references to different Kansas highway projects. Thus, on their face the two indictments do not appear to charge different conspiracies.

As previously indicated, the parties stipulated in the trial court that the transcript from the evidentiary hearing on the double jeopardy issue in *Beachner* would be incorporated in the record in this case. Thus, our opinion in *Beachner* must have weight here. The government asserts our previous ruling has no bearing on this case because we merely held in *Beachner* the findings of the trial court were not clearly erroneous. The government also argues that the question of whether the charges were of single or multiple conspiracies must be resolved from the face of the indictments, and not from the underlying facts.

Whatever the approach taken in other cases in determining the nature of the charged conspiracy, the stipulation to include consideration of the *Beachner* transcript presents a unique case and permits inquiry behind the indictment. Having conceded the applicability of the facts developed in that hearing, the government is not in the position to argue our examination of the issue must be confined to the pleadings. Can that stipulation by the government be regarded as anything but a concession on its part that the facts of the two cases are so intertwined that one is relevant to the other in consideration of the same legal issue? We think not.

We now have before us a case which is factually linked to another in which we have already found testimony that established a "continuous, cooperative effort among Kansas asphalt contractors to rig bids" for "more than twenty-

five years." *Beachner,* 729 F.2d at 1282. Moreover, that testimony established the existence of a "common method" of bid-rigging that was "well-known" and open among all the contractors. *Id.* We found evidence that "mutual and interdependent obligations were created between participating contractors" and that "the bid-rigging scheme was self-perpetuating in nature." *Id.* We then added: "The evidence showed that asphalt contractors in Kansas understood for over twenty-five years that the ability to rig bids was available using the aforementioned method. There was, therefore, no lack of conspiratorial agreement in this case." *Id.* at 1283.

When the two indictments are viewed in this factual matrix, a significant question arises whether, under the unique circumstances of this case, the defendants stood charged with participation in only one long-standing conspiracy. Moreover, on the face of the indictments, it appears the transactions set forth were mere elements in that conspiracy, and not independent conspiracies themselves. *Compare United States v. Behrens,* 689 F.2d 154(10th Cir. 1982); *United States v. McMurray,* 680 F.2d 695 (10th Cir. 1981); *United States v. Palermo,* 410 F.2d 468 (7th Cir. 1969).

Notwithstanding, the question of whether the indictments charged one or two comspiracies is, in the context of this case, wholly factual. Despite the existence of the *Beachner* record and our opinion in that case, the trial court has made no determination of those essential facts, and we are not wont to do so. While *Beachner* could logically be regarded as a significant signpost, our system requires the road to be first chosen by the trial court and not by us. In this instance, what must follow is a determination of the kind mandated in *Abney v. United States,* 431 U.S. 651 (1977), and we must remand for that purpose. We are therefore returning this case for further proceedings at the point at which the trial court arrived at an erroneous conclusion.

We hold the defendants' plea of guilty is not a bar in this case to consideration of whether the charge contained in the second indictment is void because of the Double Jeopardy Clause of the Fifth Amendment. The judgment of the trial court denying the defendants' motion to vacate sentence in 83-2558 is reversed, and the case is remanded for a factual determination on only the evidence originally presented upon the filing of defendants' motions, including the stipulation between the parties. There being no error alleged in 83-2559, the appeal is dismissed.

Nos. 83-2558 and 83-2559

UNITED STATES OF AMERICA

v.

RAY C. BROCE and BROCE CONSTRUCTION COMPANY, INC.

McKAY, Circuit Judge, concurring:

I concur fully in part I of the majority's opinion. I join in part II of the majority opinion insofar as it remands to the trial court to give it the first opportunity to consider that issue. I do so reluctantly because I believe the matter is clear enough on the record before us to establish as a matter of law that the second indictment charging the defendant with violation of the Sherman Act in connection with a conspiracy to rig bids on another Kansas highway construction project violates the double jeopardy clause. I base this conclusion upon my agreement with this court's panel opinion in the instant case, authored by Judge Bohanon. *United States v. Broce*, 753 F.2d 811 (10th Cir. 1985). In that opinion, this court stated:

> Facts therefore now appearing in this record lead to the conclusion that the defendants have been twice punished for their participation in a single continuing conspiracy. Because their double jeopardy rights have been so violated, the judgment and sentence entered under the second indictment below were illegal and the defendants' Rule 35(a) motion must be granted.
>
> Accordingly, the judgment and sentence entered by the district court on March 15, 1982 in case No. 83-2558 is hereby vacated.

Id. at 823.

My views are based, as were Judge Bohanon's, on the similarity between the two indictments with which the defendants were charged, along with the lack of specificity of those indictments. As Judge Bohanon aptly stated:

> The indictments state approximate beginning dates for the conspiracies but give no conclusion dates,

stating merely that they were "continuing." Nothing in the first indictment would preclude a finding that the conspiracy alleged therein was "continuing" throughout the period encompassed by the second indictment. The indictments do not even specify with definiteness who was involved in the alleged conspiracies. Nothing would preclude a finding that all of the people participating in the first alleged conspiracy were also participants in the second. And finally, as noted previously, there is nothing in the first indictment to indicate that the agreement and conspiracy described therein with regard to Project No. 23-60-RS-1080(9) did not also encompass other projects and and [sic] other bid-letting dates. Indeed, nothing in either indictment is definitely inconsistent with the view that the conspiracies they allege are in fact identical, and, further, are identical with the ongoing conspiracy to rig bids, extending over a period exceeding a quarter century . . . .

Id. at 820.

The rationale behind my view that this court should vacate the judgment and sentence entered in Case No. 83-2558 can be found in *Short v. United States,* 91 F.2d 614 (4th Cir. 1937):

> Blanket charges of "continuing" conspiracy with named defendants and with "other persons to the grand jurors unknown" fulfill a useful purpose in the prosecution of a crime, but they must not be used in such a way as to contravene constitutional guarantees. If the government sees fit to send an indictment in this general form charging a continuing conspiracy for a period of time, it must do so with the understanding that upon conviction or acquittal further prosecution of that conspiracy during the period charged is barred, and that this result cannot be avoided by charging the conspiracy to have been

> formed in another district where overt acts in furtherance of it were committed, or by charging different overt acts as having been committed in furtherance of it, or by charging additional objects or the violation of additional statutes as within its purview, if in fact the second indictment involves substantially the same conspiracy as the first. And, if two indictments charging continuing conspiracy and covering the same period in whole or in part are drawn with blanket coverage "with other persons to the grand jurors unknown," a plea of former jeopardy should be submitted to the jury if there is proof that the same partnership in criminal purposes is prosecuted by both, even though the appearance of identity of offenses may have been avoided in the indictment by charging a different place of conspiracy, or by joining additional defendants, or by charging different overt acts, or by charging the violation of additional statutes as being among the objects of the conspiracy. The constitutional provision against double jeopardy is a matter of substance and may not be thus nullified by the mere forms of criminal pleading.

Id. at 624. I, along with Judge Bohanon, believe that "the government cannot be allowed to evade the Double Jeopardy Clause by using vague indictments, facially distinguishable only by their reference to different overt acts, here, the submission of rigged bids on different construction projects." *Broce,* 753 F.2d at 822. Accordingly, while I do not believe that this case needs to be resubmitted to the trial court for determinations of fact, I have no objection to joining in giving the trial court the first opportunity to review the issue. I therefore join in the judgment to remand.

Nos. 83-2558, 83-2559

UNITED STATES

v.

BROCE, ET AL.

SEYMOUR, Circuit Judge, concurring in part and dissenting in part.

This case presents a difficult problem concerning the Double Jeopardy Clause of the Fifth Amendment, which declares that no person shall be "subject for the same offense to be twice put in jeopardy of life or limb . . . ." I agree that defendants' guilty pleas did not forfeit their right to challenge the indictments on double jeopardy grounds. I must respectfully disagree, however, with the broad conclusion that the Double Jeopardy Clause embodies not "an individual right which is subject to waiver,"[1] but an "absolute inhibition" upon government. *See* Majority Op. at 6. Although alluring for its clarity in an area of law which is anything but clear, in my view such a rule conflicts with the Supreme Court's consistent approval of knowing and voluntary waivers of constitutional rights. I also disagree with the conclusion that this case must be remanded to determine whether the Double Jeopardy Clause was in fact violated. I would hold that it has been and would vacate the second Sherman Act conspiracy conviction and sentence.

The notion of waiver embodies the aspiration that individuals should be entitled to decide for themselves

[1] For purposes of consistent analysis, forfeiture may be defined as the loss of a constitutional defense through the operation of law and without regard for a defendant's intentions. In contrast, waiver connotes an informed, deliberate, and uncoerced decision to relinquish such a defense. *See* Westen, *Away from Waiver: A Rationale for the Forfeiture of Constitutional Rights in Criminal Procedure*, 75 Mich. L. Rev. 1214 (1977).

whether to invoke constitutional protections. As the Supreme Court stated in *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279-80 (1942):

> "[T]he procedural safeguards of the Bill of Rights are not to be treated as mechanical rigidities. What were contrived as protections for the accused should not be turned into fetters . . . .
>
> " . . . When the administration of the criminal law in the federal courts is hedged about as it is by the Constitutional safeguards for the protection of an accused, to deny him in the exercise of his free choice the right to dispense with some of these safeguards . . . is to imprison [him] . . . in his privileges and call it the Constitution."

The Court has thus consistently allowed criminal defendants to relinquish constitutional rights. *See, e.g., Garner v. United States*, 424 U.S. 648 (1976) (freedom from self-incrimination); *Barker v. Wingo*, 407 U.S. 514 (1972) (speedy trial); *Boykin v. Alabama*, 395 U.S. 238 (1969) (trial of any kind); *Brookhart v. Janis*, 384 U.S. 1 (1966) (confrontation of witnesses); *Fay v. Noia*, 372 U.S. 391 (1963) (claims otherwise reviewable via habeas corpus); *Adams*, 317 U.S. 269 (counsel and jury trial). To be sure, the waiver of any such right must be knowing and voluntary, and courts should " 'indulge every reasonable presumption against waiver . . . .' " *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (citations omitted); *see also* Tigar, *The Supreme Court, 1969 Term, Forward: Waiver of Constitutional Rights: Disquiet in the Citadel*, 84 Harv. L. Rev. 1 (1970). When these conditions are properly fulfilled, the relinquishment of constitutional rights is permissible.

The Court has countenanced no exception for the Double Jeopardy Clause. In the seminal case of *Kepner v. United States*, 195 U.S. 100 (1904), the Court characterized freedom from double jeopardy as a right which may not be denied a defendant " 'without his consent.' " *Id.*

at 131 (quoting 1 Bishop, Criminal Law § 1026 (5th ed.)). In *Green v. United States*, 355 U.S. 184 (1957), the Court described the right in ostensibly personal terms:

> "The constitutional prohibition against 'double jeopardy' was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense. . . .
>
> " . . . The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty."

Id. at 187-88.[2] The Court then held that the right had not been waived in the circumstances of that case:

> "Nevertheless the Government contends that Green 'waived' his constitutional defense of former jeopardy to a second prosecution on the first degree murder charge by making a *successful* appeal of his improper conviction of second degree murder. We cannot accept this paradoxical contention. 'Waiver' is a vague term used for a great variety of purposes, good and bad, in the law. In any normal sense, however, it connotes some kind of voluntary knowing relinquishment of a right. Cf. Johnson v. Zerbst, 304 U.S. 458."

[2] *See also Robinson v. Neil*, 409 U.S. 505, 509 (1973) (describing guarantee against double jeopardy as "a constitutional right of the criminal defendant").

Id. at 191 (emphasis in original). In *Schneckloth v. Bustamonte*, 412 U.S. 218, 237-38 (1973), the Court listed "the right to be free from twice being placed in jeopardy" as one of those rights to which the *Zerbst* standard of knowing and intelligent waiver had been applied, specifically citing *Green*.

The subsequent cases of *Blackledge v. Perry*, 417 U.S. 21 (1974), and *Menna v. New York*, 423 U.S. 61 (1975) (per curiam), in no way mark a retrenchment from the Court's waiver jurisprudence or its conception of the Double Jeopardy Clause. *Blackledge* and *Menna* characterize the right in "jurisdictional" terms in order to delimit the circumstances under which a valid forfeiture—not waiver—may occur. Both cases hold that a mere guilty plea does not forfeit an unambiguous claim that the prosecution lacked all power to hale a defendant into court.[3] As explained in *Menna*:

> "Neither *Tollett v. Henderson*, 411 U.S. 258 (1973), nor our earlier cases on which it relied, *e.g.*, *Brady v. United States*, 397 U.S. 742 (1970), and *McMann v. Richardson*, 397 U.S. 759 (1970), stand for the proposition that counseled guilty pleas inevitably 'waive' all antecedent constitutional violations. . . . *[I]n Tollett we emphasized that waiver was not the basic ingredient of this line of cases*, 411 U.S. at 266. The point of these cases is that a counseled plea of guilty is an admission of factual guilt so reliable that, where voluntary and intelligent, it *quite validly* removes the issue of factual guilt from the case. In most cases, factual guilt is a sufficient basis for the State's imposition of punishment. *A guilty plea, therefore, simply*

[3] I would overrule *Caballero v. Hudspeth*, 114 F.2d 545, 547-48 (10th Cir. 1940), to the extent it holds otherwise, but would leave intact its characterization of the guarantee against double jeopardy as a personal right.

> *renders irrelevant those constitutional violations not logically inconsistent with the valid establishment of factual guilt and which do not stand in the way of conviction, if factual guilt is validly established.* Here, however, the claim is that the State may not convict petitioner no matter how validly his factual guilt is established. The guilty plea, therefore, does not bar the claim."

423 U.S. at 62-63 n.2 (emphasis added); *see also Haring v. Prosise*, 462 U.S. 306, 319-21 (1983).[4] *Blackledge* and *Menna* recall *Green:* the nature of the guarantee against double jeopardy restricts what may qualify as a valid forfeiture, but does not negate the possibility of a deliberate waiver. The *Menna* Court thus explicitly declined to rule that a double jeopardy claim may never be waived. *See* 423 U.S. at 62-63 n.2.

Characterizing a right in jurisdictional terms simply does not make it any less personal or necessarily immune from waiver. In *Johnson v. Zerbst*, the Court identified the right to counsel as a "jurisdictional prerequisite" to the commencement of criminal proceedings:

> "Since the Sixth Amendment constitutionally entitles one charged with crime to the assistance of counsel, *compliance with this constitutional mandate is an essential jurisdictional prerequisite to a federal court's authority to deprive an accused of his life or liberty. When this right is properly waived, the assistance of counsel is no longer a necessary element of the court's jurisdiction to proceed to conviction and sentence.* If the accused, however, is not represented by counsel and has not competently and

[4] In *Haring*, the Court held that a guilty plea does not establish that a defendant has waived any Fourth Amendment claims he seeks to pursue under 42 U.S.C. § 1983, notwithstanding that he may have forfeited the opportunity to raise the identical issue in a habeas corpus proceeding.

> intelligently waived his constitutional right, the Sixth Amendment stands as a jurisdictional bar to a valid conviction and sentence depriving him of his life or his liberty."

304 U.S. at 467-68 (emphasis added). Like the guarantee against double jeopardy described in *Menna*, the right to counsel deprives a court of power to proceed against an accused who is unrepresented. Yet *Zerbst* was a landmark decision precisely because of its statement that such a right may be knowingly and voluntarily relinquished. *See id.* at 465. It thus does not follow from the Court's jurisdictional characterization that the guarantee against double jeopardy is somehow exceptional and may never be deliberately relinquished.[5] *Accord Launius v. United States*, 575 F.2d 770, 772 (9th Cir. 1978).

Although I conclude that a double jeopardy claim may be waived, I agree with Judge Bohanon, author of the panel opinion, that there has been no waiver in this case. *Menna* confirms that any waiver of a double jeopardy claim must be deliberate in the sense envisioned by *Zerbst*. The defendant in *Menna* had raised the defense prior to pleading guilty. The New York Court of Appeals therefore construed his guilty plea as a knowing and voluntary waiver. *See People v. Menna*, 36 N.Y.2d 930, 373 N.Y.S.2d 541 (1975). In reversing, the Supreme Court held that a guilty plea relates only to factual guilt

[5] Lower federal courts, including this one, have actually gone further in another context: litigants may consent to the exercise of subject matter jurisdiction and attendant Article III powers by non-Article III magistrates, irrespective of the rights being adjudicated. *See, e.g., United States v. Dobey*, 751 F.2d 1140 (10th Cir. 1985) (appeal pending); *Pacemaker Diagnostic Clinic of America, Inc. v. Instromedix, Inc.*, 725 F.2d 537 (9th Cir.) (en banc), *cert. denied*, 105 S.Ct. 100 (1984); *Wharton-Thomas v. United States*, 721 F.2d 922 (3d Cir. 1983).

and does not by itself imply a deliberate decision to relinquish a legal claim, notwithstanding that the defendant was aware of the claim at the time of his plea. *See Menna*, 423 U.S. at 62-63 n.2. An affirmative and unambiguous indication of waiver is thus required. Indeed, as a practical matter, "[a] double jeopardy defense is normally not the type of claim that would be foregone for some strategic purpose." *United States v. Anderson*, 514 F.2d 583, 586 (7th Cir. 1975).

In this case, defendants did not receive a copy of the second indictment until almost four days after its filing. They pleaded guilty the same day. The record indicates that a waiver of double jeopardy rights was neither bargained for by the Government nor otherwise discussed with defense counsel. Counsel's uncontroverted affidavit reveals that defendants did not consider the question of double jeopardy prior to pleading guilty. Before accepting defendant's pleas, the trial judge recited a litany of constitutional rights, but did not mention the Double Jeopardy Clause. Even without invoking the presumption against waiver of constitutional safeguards, it is clear that defendants did not *deliberately* relinquish their right to challenge the indictments against them.

In dissent, Judge Barrett argues that defendants forfeited their double jeopardy claim by failing to raise the issue below as required by Fed. R. Crim. P. 12(b)(2). *See* Barrett Dissent at 19-24. The rule provides:

> "(b) Pretrial Motions. Any defense, objection, or request which is capable of determination without the trail of the general issue may be raised before trial by motion. Motions may be written or oral at the discretion of the judge. *The following must be raised prior to trial:*
>
> . . . .
>
> (2) Defenses and objections based on defects in the indictment or information (other than that it fails to show jurisdiction in the court or to charge an offense which objections shall be noticed by the court at any time during the pendency of the proceedings) . . . ."

Fed. R. Crim. P. 12(b)(2) (emphasis added). Professor Wright has answered the Rule 12 forfeiture argument as follows: "As a pleading matter this may well be true. The vice however, of multiplicity is that defendant may be given multiple sentences for a single offense. If this happens, the sentence is illegal and may be corrected at any time." 1 C. Wright, Federal Practice & Procedure § 193, at 702 n.31 (2d ed. 1982); *see also id.* § 145, at 525-26 & n.14.

> " 'The argument that one waives his right to object to the imposition of multiple sentences by his fail[ing] to object to the multiplicious nature of an indictment is a *non sequitur*. Rule 12 applies only to objections with regard to the error in the indictment itself; the effect of Rule 12 is that dismissal of a multiplicious indictment is not required; however, if sentences are imposed on each count of that multiplicious indictment the defendant is not forced to serve the erroneous sentence because of any waiver.' "

Launius, 575 F.2d at 772 (quoting *United States v. Rosenbarger*, 536 F.2d 715, 721-22 (6th Cir. 1976), *cert. denied*, 431 U.S. 965 (1977)); *see also United States v. Mastrangelo*, 733 F.2d 793, 800 (11th Cir. 1984); *United States v. Marino*, 682 F.2d 449, 454 n.3 (3d Cir. 1982). It is noteworthy that Rule 12(b)(2) excepts jurisdictional issues from those which must be raised pretrial. Given the Supreme Court's characterization of double jeopardy and the facts of *Menna*, it is apparent that Rule 12(b)(2) is no bar to raising a double jeopardy claim even post trial. Although Broce's prison sentences ran concurrently, both he and his company received cumulative fines on the two indictments. They did not forfeit the right to contest the constitutionality of those fines by failing to raise the issue during the brief interval before pleading guilty.

The question remains whether the Double Jeopardy Clause has been violated. Judge Barrett would hold that the indictments facially charged two separate conspiracies and that, by pleading guilty to the facts alleged in the indictments, Broce is factually barred from claiming a double jeopardy violation. Barrett Dissent at 11-14. The majority declares the double jeopardy question to be one of fact which must first be determined by the trial court on remand. Majority Op. at 12.

If the indictments in this case alleged two separate conspiracies with sufficient clarity and specificity, then a plea of guilty to each arguably could be construed as establishing that two such conspiracies existed. As an example, Judge Barrett relies upon the case of *Kerrigan v. United States*, 644 F.2d 47 (1st Cir. 1981). The indictments against Kerrigan clearly charged two separate conspiracies to transport stolen goods in interstate commerce. One conspiracy allegedly occurred between the specific dates of August 25 and September 1, 1977, with two named co-conspirators. The other, involving different goods, allegedly occurred between September 1 and September 22, 1977, with only one of the previously named co-conspirators. The court held that Kerrigan could raise a double jeopardy claim only by repudiating the alleged facts to which he had pleaded guilty:

> "Evaluated in this way, Kerrigan's claim is quite different from that asserted in *Launius*; far from being facially multiplicitous, as in *Launius*, Kerrigan's indictments sufficiently describe two separate and distinct offenses, for which Kerrigan could be constitutionally sentenced to two separate terms of imprisonment."

Id. at 49.

Unlike *Kerrigan*, this case presents a clear example of two indictments which, because of imprecise draftsmanship, fail to rule out the existence of a single continuing

conspiracy. The indictments are virtually identical, differing only in that they purport to charge bid-rigging with respect to different Kansas highway projects. The first indictment, however, also refers to the discussion of additional projects not specified in the indictment. The Government's "Statement of Facts in Support of Pleas," which was attached to the plea agreements in this case, further reveals that these additional projects were not all let on the same date.[6] Neither of the indictments eliminates the possibilities that the overt act of bid rigging alleged in the second indictment fell within the scope of the conspiracy charged in the first. The indictments give no indication of when either conspiracy ended, thereby implying an overlap in time; and they refer to "known and unknown" individuals, thereby implying an overlap of participants.

These features raise a presumption that the two indictments concerned a single conspiracy. *See United States v. Novak*, 715 F.2d 810, 818 (3d Cir. 1983) (citing *United States v. Mallah*, 503 F.2d 971, 985-87 (2d Cir. 1974)), *cert. denied*, 104 S. Ct. 1293 (1984). "[I]t is the government which has control over the drafting of indictments. Any burden imposed by the imprecision in the description of separate offenses should be borne by it." *United States v. Inmon*, 568 F.2d 326, 332 (3d Cir. 1977).

> "Blanket charges of 'continuing' conspiracy with named defendants and with 'other persons to the grand jurors unknown' fulfil a useful purpose in the prosecution of crime, but they must not be used in

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[6] Although not technically part of the indictment, this statement was on record when defendant's pleas were accepted and it presumably reflects the Government's account of what was to be admitted through their pleas. In any event, the indictment must not be read as referring to a single bid-letting date or it would follow that the Government chose the indictment's language in a deliberate attempt to misstate the facts.

such a way as to contravene constitutional guaranties. If the government sees fit to send an indictment in this general form charging a continuing conspiracy for a period of time, it must do so with the understanding that upon conviction or acquittal further prosecution of that conspiracy during the period charged is barred, and that this result cannot be avoided by charging the conspiracy to have been formed in another district where overt acts in furtherance of it were committed, or by charging different overt acts as having been committed in furtherance of it, or by charging additional objects or the violation of additional statutes as within its purview, if in fact the second indictment involves substantially the same conspiracy as the first. . . . The constitutional provision against double jeopardy is a matter of substance and may not be thus nullified by the mere forms of criminal pleading."

Short v. United States, 91 F.2d 614, 624 (4th Cir. 1937); *see also United States v. Abbamonte*, 759 F.2d 1065, 1070 (2d Cir. 1985).

Given the vaguenes of the indictments, defendants could not and did not admit the existence of separate conspiracies merely by pleading to the facts alleged.[7] They are therefore not barred from establishing the existence of one continuing conspiracy. While the majority agrees with this

[7] I do not dispute that a defendant is bound by that to which he pleads and by whatever he states in open court as the basis for his plea. In my view, however, a defendant remains free to offer evidence in support of a surviving double jeopardy claim which does not contradict these admitted facts. *See Menna*, 423 U.S. at 62-63 n.2; *see also Abney v. United States*, 431 U.S. 651, 659 (1977).

view of the indictments, it would remand for an initial determination of the factual question. I submit, however, that the issue has already been resolved. In *United States v. Beachner Construction Co.*, 729 F.2d 1278 (10th Cir. 1984), this court upheld the factual finding of a single continuing conspiracy to rig bids within the Kansas asphalt industry. After this finding was made but before it was affirmed, the Government in this case stipulated that the record in *Beachner* could be considered in deciding defendant's Rule 35 motion. I read the stipulation as conceding, apart from the issues of waiver and forfeiture, that the factual circumstances presented here are indistinguishable from those in *Beachner* with respect to the existence of a double jeopardy violation.

Even Judge Barrett agrees that the district court's factual determination in *Beachner* should control future cases involving the Kansas asphalt industry:

> "[F]ollowing the filing of that opinion, all subsequent prosecutions in the District of Kansas or elsewhere in this circuit involving the identical factual bid-rigging scenario would be controlled by our holding in *Beachner*: that the scheme constituted a single, ongoing, continuous conspiracy."

Barrett Dissent at 12-13. The Government has received a full and fair opportunity to litigate this ultimate issue of fact. I see no reason why the *Beachner* findings should not be accorded full preclusive effect in this proceeding. Thus on remand the trial court could not now find that defendants were involved in more than one bid-rigging conspiracy. Because of the unusual relationship between this case and *Beachner*, I would vacate the conviction and sentences in No. 83-2558.

Nos. 83-2558 and 83-2559

UNITED STATES OF AMERICA

v.

RAY C. BROCE, ET AL.

BARRETT, Circuit Judge, dissenting:

Judge O'Connor, in my view, correctly denied relief to the *Broce* defendants pursuant to Fed. R. Crim. P. 35(a) which provides that "[T]he court may correct an *illegal* sentence at any time and may correct a sentence imposed in an *illegal* manner within the time provided herein for the reduction of sentence." (Emphasis supplied.) At the time the guilty pleas were voluntarily entered in *Broce*, the *Beachner* opinion had not been filed. In fact, *Beachner* did not come down for more than two years after the *Broce* pleas were entered. There was, then, absolutely nothing *facially illegal* about the two indictments to which *Broce* pled guilty. They charged separate, independent conspiratorial acts in violation of the antitrust laws. There had been no judicial precedent *at that time* finding, as a *matter of fact*, that the separate "rigged" highway bids were other than separate conspiracies. Although the parties stipulated that Judge O'Connor "may consider the record made in the evidentiary hearing on the Motion to Dismiss [in *Beachner*] . . . in ruling on the merits of defendants' Motion to Vacate Sentence Pursuant to Rule 35(a) . . . " (R., Vol. I, p. 97), the district court was not required to apply *Beachner* retroactively. Judge O'Connor did, however, consider the *Beachner* record.[1]

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[1] The panel of this court that handed down *United States v. Beachner Const. Co., Inc.*, 729 F.2d 1278 (10th Cir. 1984) (*Beachner*), consisted of then Chief Judge Seth, O'Connor, Chief Judge, United States District Court for the District of Kansas, and Barrett, Circuit Judge, who authored the opinion. We there held in a case involving *the same and identical factual scenario as that before us here* that Judge Saffels *was not clearly erroneous* in concluding that because a common objective was shared by each participating contractor as a single, common and continuous scheme, the record supported the trial court's finding of a single conspiracy.

In the original panel *Broce* opinion reported as *United States v. Broce*, 753 F.2d 811 (10th Cir. 1985), it is interesting to note that Judge O'Connor was the trial judge whose order denied the Rule 35 motion to vacate guilty pleas to a second indictment charging separate bid-rigging conspiracies. On appeal Judge Seth dissented from the holding that *Broce* had been subjected to double jeopardy by pleading guilty to two indictments charging conspiracy to violate the antitrust laws.

The facts of this case are not in dispute. The *Broce* defendants were initially charged on *November 7, 1981*, by a two-count indictment for violations of the federal antitrust laws (15 U.S.C. § 1) and the mail fraud statute (18 U.S.C. § 1341) in relation to a specific Kansas highway construction project. Thereafter, on *February 4, 1982*, the *Broce* defendants were charged in a second indictment with a one-count violation of the federal antitrust laws in relation to a separate, distinct Kansas highway construction project. On *February 8, 1982*, pursuant to a plea bargain agreement the *Broce* defendants entered guilty pleas to the charges contained in both indictments. The trial court, prior to sentencing, conducted a detailed, thorough Rule 11 proceeding. There is no contention that the *Broce* defendants were represented other than by competent counsel or that the district court did not meticulously conduct the Rule 11 proceeding. Sentences were entered *March 15, 1982*. The *Broce* defendants file their Motion to Vacate Sentence on the ground that their sentences were in violation of the double jeopardy clause on *February 22, 1983*. *Id.* at 34.

I deem the trial court's reasoning in denying the *Broce* defendants Rule 35(a) relief as set forth in the court's Memorandum and Order important in our determination of the issue. Thus, I quote therefrom:

> The defendants' recent double jeopardy claim was inspired by the January 31, 1983 Memorandum and Order by Judge Dale E. Saffels of this court, in

another case involving bid-rigging in Kansas highway construction projects, *United States v. Beachner Construction Co., Inc., et al.*, No. 82-20076-01. Beachner Construction Co., Inc., was indicted on February 4, 1982, for a violation of the Sherman Antitrust Act and a mail fraud violation. Both charges related to a Kansas highway project let by the state of Kansas on Feburary 7, 1980. Robert Beachner was subsequently indicted for the same alleged offenses. The case proceeded to trial on May 3, 1982 ("*Beachner I*"). By a verdict rendered on May 7, 1982, a jury acquitted both defendants of the conspiracy and mail fraud charges.

On November 16, 1982, another indictment was returned by the grand jury, naming Beachner Construction Co., Inc., and Jerry Beachner as defendants. This indictment ("*Beachner II*") contained three counts alleging violations of §1 of the Sherman Act, and three counts alleging mail fraud violations. Judge Saffels found the *Beachner I* and *Beachner II* indictments to be identical, with the exception that *Beachner II* named Jerry Beachner rather than Robert Beachner, and that *Beachner II* specified three different highway projects.

In *Beachner II*, Beachner Construction Co., Inc., moved to dismiss the November 16, 1982 indictment, alleging *inter alia* double jeopardy and collateral estoppel. Following an evidentiary hearing, the court entered its January 31, 1983 Memorandum and Order, in which it concluded that the conspiracies charged in *Beachner I* and *Beachner II* were merely separate parts of a single larger and ongoing bid-rigging conspiracy that had been continuing for several years. Accordingly, Judge Saffels granted Beachner Construction Co., Inc.'s motion to dismiss.

Discussion

The defendants in the instant case, Broce Construction Co., Inc., and Ray C. Broce, contend that in light of Judge Saffels' decision in *Beachner II*, the judgment and sentence in Case No. 82-20011-01 constitutes a violation of the double jeopardy clause because it sentenced the defendants on two separate highway projects, as separate conspiracies, although they were both part of a single overall conspiracy to rig bids on Kansas highway construction projects. In addition, Broce Construction Co., Inc., contends that the total of 1.5 million dollars in fines imposed by the court was illegal because it exceeded the legal penalty of one million dollars per violation, as prescribed by 15 U.S.C. §1.

The defendants contend that in light of Judge Saffels' *Beachner II* ruling, they were guilty of only one bid-rigging offense—a single conspiracy—rather than two. The defendants thus allege that the sentence imposed by the court violates the double jeopardy clause on the ground of multiplicity in that it punishes them twice for a single offense.

It is certainly clear that the double jeopardy clause does protect a defendant against multiplicity of punishment. In *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969), the Court stated:

> That guarantee [against double jeopardy] has been said to consist of three separate constitutional protections. It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. *And it protects against multiple punishments for the same offense* . . . .
>
> (Footnotes omitted) (emphasis added).

The defendants thus contend that they should be entitled to take advantage of Judge Saffels' *Beachner II* ruling because a Rule 35(a) motion can be raised "at any time." Although it is the general rule that a Rule 35(a) motion can be raised at any time [*Heflin v. United States*, 358 U.S. 415 (1959); *United States v. Golay*, 560 F.2d 866, 870 (8th Cir. 1977)], the government argues that the defendants waived their double jeopardy claim because it was not timely raised and because the defendants pleaded guilty to two separate conspiracies. The issue in the case is therefore whether a plea of guilty to counts alleging two separate conspiracies constitutes a waiver of a claim of double jeopardy on the ground that the defendants are being subjected to multiple punishment for a single offense.

* * *

In *Menna*, even though the defendant's guilty plea admitted the facts of his offense, the indictment—*on its face*—arguably violated the double jeopardy clause by charging him a second time for the conduct that was the subject of his previous contempt conviction. Thus, the defendant's double jeopardy claim was not rendered irrelevant by his guilty plea because the indictment *on its face* sought to punish the same conduct, thereby giving rise to a possible double jeopardy violation. In contrast, the challenged second indictment in the instant case (No. 82-20011-01) does not *on its face* seek to punish the defendants for the same conduct for which they were charged in the previous indictment (No. 81-20119-01). *Menna* left unanswered the question of whether a plea of guilty to one or more counts not multiplicious on their face constitutes a waiver of a claim of double jeopardy.

Our research reveals that few courts have squarely confronted this question left unanswered by the Supreme Court in *Menna*. Although the defendants have cited two broadly-worded opinions for the proposition that a guilty plea does not constitute a waiver of a double jeopardy claim, *United States v. Broussard*, 645 F.2d 504 (5th Cir. 1981); *Launius v. United States*, 575 F.2d 770 (9th Cir. 1978), neither of these cases involved a plea of guilty to an indictment or information that was not multiplicious on its face. In other words, the cases cited by the defendants are entirely within the scope of the rule announced in *Menna*.

The defendants point out that there is broad language in the *Launius* opinion to the effect that a waiver of a double jeopardy claim must be a " 'waiver' as defined in *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938)—the intentional relinquishment or abandonment of a known right or privilege." 575 F.2d at 772. The government, in response, has cited to a line of cases in the Eighth and Second Circuits to the effect that a claim of double jeopardy is non-jurisdictional and is waived if not timely and affirmatively pleaded. *United States v. Herzog*, 644 F.2d 713, 716 (8th Cir. 1981); *McClain v. Brown*, 587 F.2d 389, 391 (8th Cir. 1978); *United States v. Perez*, 565 F.2d 1227, 1232 (2d Cir. 1977). The Tenth Circuit apparently had not addressed the question of waiver of a double jeopardy claim. We are not convinced, however, that the waiver theories announced in either *Launius* or the *Herzog* line of cases should be applied to the facts of the instant case.

We believe that the resolution of the pending motion should be controlled by the opinion in *Kerrigan v. United States*, 644 F.2d 47 (1st Cir. 1981), which

more closely resembles the facts and the resulting legal issues of the matter at bar than does any other case cited by the parties or uncovered by the court's research. Kerrigan was indicted in two separate indictments by a federal grand jury. The first indictment charged that Kerrigan conspired with others, between August 25, 1977, and September 1, 1977, to transport and to sell stolen lithographs. The second indictment charged that Kerrigan conspired with one of his previous co-conspirators, between September 1, 1977, and September 22, 1977, to transport and to sell stolen Indian jewelry. The second indictment also charged Kerrigan with a substantive count of transporting the stolen jewelry in interstate commerce. Kerrigan pleaded guilty to the two conspiracy charges, each before a different judge, and in exchange the government dismissed the substantive count. On March 15, 1978, Kerrigan was sentenced to three years for the jewelry conspiracy and two years (consecutively) for the lithograph conspiracy. After his sentencing, Kerrigan challenged the two-year sentence on the ground that the two charges involved parts of a single conspiracy. The district court adopted the magistrate's finding that the indictments charged separate conspiracies, and rejected Kerrigan's challenge to his sentence.

On appeal, Kerrigan again asserted that there was only one conspiracy and argued, relying on *Menna* and *Launius*, that his guilty plea did not waive his right to raise the double jeopardy claim. In the opinion for the First Circuit, Judge Campbell discussed *Menna* and *Launius* at some length.

> *Menna* and *Launius* do indeed indicate that a double jeopardy claim may lie notwithstanding a guilty plea, but in neither case did the double jeopardy claim depend upon a repudiation of the

> allegations in the indictment to which the plea had been entered. These cases do not hold, as Kerrigan suggests, that a defendant who pleaded guilty may later contest the factual and theoretical foundations of the indictment to which he pleaded, so as to show that, in fact, he committed only a single offense. The court in *Launius* explicitly and correctly stated that "By pleading guilty appellants admitted the facts alleged in the information." [Citations omitted]. Kerrigan's claim of double jeopardy must be evaluated under the version of facts stated in the indictment, not against an alternative version of events which Kerrigan now claims is more accurate. Evaluated in this way, Kerrigan's claim is quite different from that asserted in *Launius*; far from being facially multiplicitous, as in *Launius*, Kerrigan's indictments sufficiently described two separate and distinct offenses, for which Kerrigan could be constitutionally sentenced to two separate terms of imprisonment.
>
> 644 F.2d at 49.

Judge Campbell concluded that:

> the two agreements charged related to commission of crimes which were similar but distinct. Thus, facially, it is possible to have had two conspiracies. . . . By pleading guilty, Kerrigan accepted the government's two-conspiracy allegations, and it is too late for him to try to establish something else. The factual allegations of the indictments sufficiently charge two separate conspiracies; Kerrigan is bound by these facts because of his guilty pleas; and Kerrigan has therefore not been twice placed in jeopardy for the same offense.
>
> *Id.*

The similarity between the facts of the case now at bar and those of *Kerrigan* is inescapable. Defendants Ray C. Broce and Broce Construction Co., Inc., pleaded guilty to two separate indictments alleging different conspiracies beginning at different times (more than one year apart) and involving different construction projects. On their faces, the indictments alleged two distinct criminal conspiracies, and the defendants pleaded guilty to each, acknowledging the validity of the facts contained in each indictment. Accordingly, we feel compelled to adopt the First Circuit's reasoning that the defendants "accepted the government's two-conspiracy allegations, and it is too late for [them] to try to establish something else." 644 F.2d at 49.

There remains, however, the defendants' suggestion that, notwithstanding their pleas of guilty, Judge Saffels' subsequent ruling in *Beachner II*, that there was only one agreement among Kansas contractors to rig bids, rendered their sentences invalid and that it now "appears from the face of the indictments that but one conspiracy existed for which defendants have been twice punished." (Defendant's Reply, at 9.) In support of this theory that an intervening court decision can merge the contents of previous indictments alleging two conspiracies into a single conspiracy, the defendants cite *Smith v. United States*, 287 F.2d 270 (9th Cir. 1961).

In *Smith*, the defendant pleaded guilty to a three-count information arising out of a bank robbery. Each count charged the defendant with violating a different subsection of 18 U.S.C. §2113. After the defendant was sentenced, the

Supreme Court of the United States, in another case, held that the subdivisions of 18 U.S.C. §2113 charged but one offense and that the imposition of more than one sentence was illegal. As a result, the defendant's sentence was corrected.

We are not persuaded that this line of reasoning is applicable here. *Smith v. United States* is distinguishable from the situation at bar in that the intervening decision in that case involved a question of *law*: the operation of a statute. Consequently, the Supreme Court's decision was applicable to Smith's case. Judge Saffels' finding of a single conspiracy in *Beachner II*, however, was a factual determination made in light of the evidence produced at an evidentiary hearing in that particular case. It is well settled that the question whether a single conspiracy or multiple conspiracies exist is a question of fact. *United States v. Elam*, 678 F.2d 1234, 1245 (5th Cir. 1982); *United States v. James*, 576 F.2d 1121, 1126 (5th Cir. 1978); *United States v. Armedo-Sarmiento*, 545 F.2d 785, 789 (2d Cir. 1976), *cert. denied*, 430 U.S. 917 (1977); *United States v. Ippolito*, 509 F.Supp. 1205, 1208 (E.D. N.Y. 1981). Accordingly, we do not believe that at this late date the defendants should be permitted to take advantage of a factual determination that is inconsistent with the facts the defendants admitted in pleading guilty to the indictments alleging two separate conspiracies.

We do not agree with the defendants' allegation that "[t]he position of the government would effectively deprive any defendant who pleads guilty of the right to file a Rule 3[5] motion which specifically preserves this right to those

> who plead guilty." (Defendants' Reply, at 10.) We hold merely that where a defendant by pleading guilty admits facts that do not give rise to a double jeopardy claim, he will not later be permitted to raise a double jeopardy claim that depends upon a version of the facts different from that he has admitted.

(R., Vol. II, pp. 281-90.) It is apparent from the above-quoted excerpt of Judge O'Connor's Memorandum and Order that he carefully considered the record in *Beachner* yet properly denied the *Broce* defendants relief because they had pled guilty to facially legal indictments, their pleas admitted the factual basis of the charges, and *Beachner* did not control this case.

I.

Menna and Blackledge

The trial court, unlike the majority, found that *Menna v. New York*, 423 U.S. 61 (1975) was not applicable here. By analogy, the same rationale would apply to *Blackledge v. Perry*, 417 U.S. 21 (1974), which case was not addressed by the trial court. I agree with the trial court's analysis. Thus, I conclude that *Menna* and *Blackledge* do not apply to the case at bar.

Significantly, in both *Menna* and *Blackledge*, the double jeopardy challenge was posited (like *Beachner*) prior to trial. I recognize that this is not always conclusive, but it weighs heavily here. It was not of significance in *Menna* because plainly—without the need of an evidentiary hearing—*Menna* had been twice placed in jeopardy: Menna had initially been incarcerated on a contempt charge *for refusal to obey a court order to appear and testify before the grand jury*. Thereafter, following denial of his motion to dismiss the indictment *for refusal to answer questions before the same grand jury,* he entered a guilty plea thereto and was sentenced. The Supreme Court logically

held that Menna's earlier conviction for contempt was a criminal conviction "*for the same crime as the one charged in the instant indictment.*" 423 U.S. at 62, n. 1 (emphasis supplied). *No evidentiary hearing involving the fact-finding process was required to arrive at that logical conclusion.*

In *Blackledge v. Perry*, 417 U.S. 21 (1974), again there was no fact-finding evidentiary hearing required in order for the Supreme Court to conclude that after *Blackledge* had been charged, tried and convicted by the state authorities on a *misdemeanor* charge that he could not subsequently be charged, tried and convicted by those same state authorities on a *felony* charge involving *the identical facts and circumstances.* The Supreme Court held that the felony charge was lodged against Blackledge in retaliation to his filing of a petition for trial *de novo* of his misdemeanor conviction, constituting a deprivation of due process of law. Neither *Menna* nor *Blackledge* involve the rule at the heart of the case at bar: absent a statutory impediment (i.e., lack of subject matter jurisdiction) or a Due Process deprivation (i.e., filing a subsequent charge in retaliation to a defendant taking appeal from an earlier conviction), the rule in this circuit has long been—and continues to be after *Menna* and *Blackledge*—that an accused *waives* his claim of double jeopardy to a subsequent criminal charge if the crimes charged, *on their faces*, are separate and distinct and if the evidence necessary to establish guilt as to one charge differs from that necessary to establish guilt as to another. In such case, we have held that the right not to be placed in jeopardy twice for the offense is a personal right which may be waived by a guilty plea. *Caballero v. Hudspeth*, 114 F.2d 545 (10th Cir. 1940); *Cox v. Crouse*, 376 F.2d 824 (10th Cir. 1967); *Cox v. State of Kansas*, 456 F.2d 1279 (10th Cir. 1972); *United States v. Rich*, 589 F.2d 1025 (10th Cir. 1978); 24 ALR 4th 1313.

These cases are consistent with Judge O'Connor's reliance on *Kerrigan v. United States*, 644 F.2d 47 (1st Cir. 1981). This is the *only* case, in the course of our research, which closely fits the niche of the facts of the instant case. Kerrigan pled guilty and was sentenced under two indictments, both of which charged him with conspiracy to transport stolen goods in interstate commerce. Thereafter, Kerrigan brought a habeas corpus action contending that his sentence should be vacated on the ground that it violated his Fifth Amendment rights not to be twice placed in jeopardy for the same offense. The court of appeals affirmed the district court's denial of relief and pertinently observed:

> *Menna* and *Launius* do indeed indicate that a double jeopardy claim may lie notwithstanding a guilty plea, but in neither case did the double jeopardy claim depend upon a repudiation of the allegations in the indictment to which the plea had been entered. These cases do not hold, as Kerrigan suggests, that a defendant who pleaded guilty may later contest the factual and theoretical foundations of the indictment to which he pleaded, so as to show that, in fact, he committed only a single conspiracy. The court in *Launius* explicitly and correctly stated that "By pleading guilty the appellants admitted the facts alleged in the information." *Brady v. United States*, 397 U.S. 742, 748 . . . (1970); *Willard v. United States*, 445 F.2d 814, 816 (7th Cir. 1971). *Kerrigan's claim of double jeopardy must be evaluated under the version of facts stated in the indictment, not against an alternative version of events which Kerrigan now claims is more accurate. Evaluated in this way, Kerrigan's claim is quite different from that asserted in Launius; far from being facially multiplicitious, as in Launius, Kerrigan's indictments sufficiently describe two separate and distinct offenses, for which Kerrigan could be constitutionally sentenced to two separate terms of imprisonment.*

644 F.2d at 49 (emphasis supplied).

Consistent with the logic of *Kerrigan*, it is my view that the *only* effect that can be firmly placed on *Beachner* is that *following the filing of that opinion, all subsequent* prosecutions in the District of Kansas or elsewhere in this circuit involving the identical factual bid-rigging scenario would be controlled by our holding in *Beachner*: that the scheme constituted a single, on-going, continuous conspiracy. To that extent and only to that extent the Government should be collaterally estopped from relitigating the precise, identical issue in subsequent criminal prosecutions. This is simply the application of the principle of issue preclusion. *See, Bullock v. Pearson*, No. 84-1830 (10th Cir., July 26, 1985). Thus, there is no analogy between *Broce* and the double jeopardy bar found in *Blackledge* based upon a due process deprivation of a fundamental nature.

The majority opinion does, as the Government contends, (a) encourage defendants to challenge their sentences long after their guilty pleas are entered, effectively undermining the effectiveness of the criminal justice system and the finality of convictions, and (b) discourage federal prosecutors from entering into plea bargaining with all advantages cast on the side of the defendant and the government realistically inviting deprivation of its benefits under the plea bargain.

The analogy between the instant case and *Kerrigan*, in the double jeopardy context, is strikingly clear: Evaluating the allegations in the indictment *both* from a factual viewpoint and applicable law *existing at the time of the Broce plea*, the double jeopardy claim must fail. Notwithstanding Judge Saffels' finding of fact in *Beachner* that the various highway contractors entered into a single, ongoing conspiracy to rig highway construction bids, this *was not* a

binding rule of law when the *Broce* pleas were entered, voluntarily and upon advice of competent counsel. This court did not affirm Judge Saffels' *Beachner* finding/conclusion (single versus multiple conspiracies) *until more than two years after the Broce guilty pleas* had been entered admitting the facts alleged, i.e., that each separate highway bid rigged contract constituted a *separate, single,* conspiracy.

Caballero v. Hudspeth, supra, was an appeal from the district court's denial of habeas corpus relief. We there held on appeal, that the defendant's guilty plea to a two count indictment involving violation of the White Slave Act was improper (but not invalid) because the emphasis of the statute is on the interstate transportation and in this case there was but *one trip*, and that the one transportation involved but one offense. The defendant had been charged and pled guilty to two counts involving transportation of one Elise Herbert: one count charged that the defendant intended to compel her to engage in prostitution; the second count charged that the defendant intended to unlawfully cohabit with her. This court held, however, that the charges were *facially* valid and that the defendant was not subjected to double jeopardy because he entered the guilty plea voluntarily, while represented by competent counsel, and did not object to the charges at any stage of the proceeding. Under these circumstances, we held that the right not to be placed in jeopardy twice is a personal right which may be waived by a plea of guilty.

In *Cox v. State of Kansas, supra*, Cox, a state prisoner, appealed a district court denial of his petition for federal habeas corpus relief. Cox had been convicted, following his guilty plea in 1966, to a charge of second degree kidnapping. Cox relied on *Benton v. Maryland*, 395 U.S. 784 (1969). There, Benton had been tried in a Maryland state court for burglary and larceny. He was acquitted of larceny but found guilty of burglary. Because the jury had

been selected under the invalid Maryland constitutional provision, Benton was given the option of demanding re-indictment and retrial. He was re-indicted for both larceny and burglary. *Prior to retrial*, Benton moved to dismiss the larceny charge on the ground of double jeopardy. The motion was denied and Benton was subsequently convicted of both larceny and burglary. The Supreme Court struck down the larceny conviction because of his acquittal of this charge in the first trial. *There was no contention made that the charges (larceny and burglary) were facially invalid and other than separate, distinct offenses.* Cox, unlike Benton, *did not challenge the indictment prior to trial.* In denying Cox federal habeas relief this court quoted *Brady v. United States*, 397 U.S. 742, 757 (1970): "[A] voluntary plea of guilty intelligently made in the light of the then applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise."

Menna discloses the double jeopardy bar *on the face* of the charges involved. *Blackledge* discloses a prosecutorial intent to deny Blackledge due process of law by initiating *felony* proceedings arising out of the same acts and circumstances as those involving a *misdemeanor* conviction he was appealing. The due process deprivation was that of retaliation for Blackledge's appeal from the misdemeanor conviction. Neither case, I submit, involved the situation presented here: the *Broce* pleas were to charges contained in indictments alleging separate, distinct conspiracies *on their face*; there was no statutory impediment creating lack of subject matter jurisdiction; there was no substantive due process violation by the prosecution; and there were no judicial opinions then in being and controlling dictating that the indictments to which Broce pled guilty were duplicitous. Judge Seth, in his *Broce* dissent, logically dissected *Menna*:

> Virtually all the courts of appeal since *Menna* have continued to hold that the defense is waived if not

raised in some way before trial *as it was in Menna.* This is a perfectly reasonable construction of *Menna* where the defense was so raised. The Court in *Menna* stated that a plea of guilty "removes the issue of factual guilt from the case." The Court also there stated:

> We do not hold that a double jeopardy claim may never be waived. We simply hold that a plea of guilty to a charge does not waive a claim that—judged on its face—the charge is one which the State may not constitutionally prosecute.

The indictments in the case before us do on their faces allege separate offenses. By the guilty pleas the defendants admitted the recitations in the indictments, and these are the facts to be used in evaluating the double jeopardy claims. *Kerrigan v. United States,* 644 F.2d 47 (1st Cir. 1981). These facts recite separate offenses.

The case which upholds appellants' position that *Menna* precludes waiver, and it may be the only case, is *Launius v. United States,* 575 F.2d 770 (9th Cir. 1978). The post-*Menna* cases with contrary holdings (or which consider situations where the defense was raised at or before trial and so hold no waiver) include: *United States v. Pratt,* 657 F.2d 218 (8th Cir. 1981); *United States v. Broussard,* 645 F.2d 504 (5th Cir. 1981); *United States v. Gaertner,* 583 F.2d 308 (7th Cir. 1978); *United States v. Inmon,* 568 F.2d 326 (3rd. Cir.1977); *United States v. Wild,* 551 F.2d 418 (D.C. Cir. 1977) . . . .

753 F.2d 811, 824 (10th Cir. 1985) (emphasis at the end of the first paragraph supplied).

II.

The Waiver Issue

The majority opinion, in reliance on *Menna* and *Blackledge,* seems to paint a broad-swath rule that a double jeopardy claim cannot be waived. Those cases do not and cannot stand for such a broad rule. In both *Menna* and *Blackledge* the Court was dealing with obvious *jurisdictional* problems: the very power to prosecute a second time.

Broce does not present a jurisdictional problem. Thus, our well-recognized rule that a claim of double jeopardy is a personal right which may be waived is fully applicable. *Broce,* just as *Beachner,* presented a factual issue as to whether the conspiracies charged in the separate indictments arose out of *one* continuous, ongoing scheme (and thus one conspiracy) or separate, distinct conspiracies. There is nothing unique in challenges to such indictments under the Double Jeopardy Clause. In making such determinations, the issue presented is *one of fact* for the court or jury. *United States v. Dickey,* 736 F.2d 571, 581 (10th Cir.), *cert. denied,* 105 S.Ct. 957 (1984); *United States v. Beachner Const. Co., Inc., supra; United States v. Watson,* 594 F.2d 1330, 1340 (10th Cir.), *cert. denied,* 444 U.S. 840 (1979); *United States v. Petersen,* 611 F.2d 1313, 1327 (10th Cir. 1979), *cert. denied,* 447 U.S. 905 (1980).

In *Dickey, supra,* the prosecution charged a single, ongoing conspiracy among the defendants involving possession and distribution of drugs for profit. On appeal the defendants urged that the *evidence was insufficient* to prove one conspiracy and that it disclosed multiple conspiracies. Thus, the contention was that reversal was required on the ground of variance between the charge and the evidence. This court affirmed the jury's fact-finding of a single, ongoing conspiracy under the clearly erroneous rule. In *United States v. Hines,* 728 F.2d 421 (10th Cir.),

cert. denied, 104 S.Ct. 3523 (1984), we held, in the same vein as the *Blackledge* Court, that various counts of the indictment charging the defendant with breaking and entering a Post Office with intent to commit larceny and steal separate matters (as charged) such as letters containing credit cards, checks, etc., were not multiplicious because the statutes enacted by the Congress made each taking a separate crime and that each required proof of facts which were not required of the other. And in *United States v. DuFriend*, 691 F.2d 948 (10th Cir. 1982), *cert. denied*, 459 U.S. 1173 (1983), we held that there was no inherent double jeopardy problem raised by defendant's conviction of *both* conspiracy to possess marijuana and conspiracy to possess marijuana with intent to distribute, relying on *Albernaz v. United States*, 450 U.S. 333 (1981) for the proposition that "[T]here clearly is no inherent double jeopardy problem raised by appellant's convictions for both conspiracy to import and conspiracy to distribute marijuana." 691 F.2d at 952.

Rule 12(b)(2), Fed. R. Crim. P. requires that a complaint about the multiplicity of an indictment and its inherent double jeopardy problems must be raised before trial. Any defense, objection or request that is capable of determination without a trial of the general issue may be raised before trial by motion. Wright, *Federal Practice and Procedure: Criminal 2d*, § 193, pp. 692-93. Nothing in *Menna* or *Blackledge* dilutes compliance with this rule *if* the charges to which the defendant pled guilty or was convicted were *valid on their face*, that is: at the time of the plea, the separate charges were not subject to the impediment of lack of subject matter jurisdiction or brought in retaliation or some other deprivation of a due process right of the defendant.

It is important to recall that the *Broce* pleas of guilty were entered on *February 8, 1982*. Judge Saffels entered his order finding a single conspiracy in *Beachner* following

a second indictment filed on *November 16, 1982*, some *nine months* after the *Broce* pleas had been entered. Our *Beachner* opinion was not filed until *March 22, 1984*. Beachner did, as previously noted, preserve the double jeopardy challenge by virtue of a pre-trial Rule 12(b)(2) motion, which generated the pre-trial evidentiary hearing conducted by Judge Saffels leading to the court's finding that only one conspiracy existed involving the Kansas highway construction bid-rigging scheme. In addition to Rule 12(b)(2), it is to be noted that the *Broce* defendants could have availed themselves of Rule 11(b), Fed. R. Crim. P. by entering a conditional plea of guilty manifesting a knowledgeable admission of the facts contained in the indictments, while perserving the issue of double jeopardy. *United States v. Moskow*, 588 F.2d 882 (3rd Cir. 1978); *United States v. Zudick*, 523 F.2d 848 (3rd Cir. 1975); 33 ALR Fed. 385.

The record before us shows conclusively that the trial court meticulously met all of the requirements of Rule 11 for acceptance of the *Broce* pleas, including full and complete advisement of the nature of the charges, the length of possible incarceration and other punishment, and advisement that the court was not bound by the plea agreement. The court established the existence of a factual basis for the pleas, the competency of the defendants to plead, the assistance of competent counsel, the voluntariness of the pleas based on the plea agreement, and the defendants' complete understanding of the consequences of the guilty pleas. (R., Vol. II, pp. 102-91.) The court also fully complied with the *ABA Standards*, Pleas of Guilty § 1.4. *Menna* recognizes that a counseled guilty plea validly removes the issue of factual guilt from the case. I conclude that the *Broce* defendants effectively waived their right to collaterally attack their guilty pleas by virtue of their failure to raise the double jeopardy challenge pursuant to

Rule 12(b)(2) or Rule 11(b). This, in my view, is precisely the type of case the Supreme Court made reference to in *Menna* when it opined that its holding was not to be considered as one which closed the door to a waiver of a double jeopardy claim by virtue of *all* guilty pleas. 423 U.S. at 63 n.2.

I turn now to the Rule 35, Fed. Rules Crim. P. motion filed by *Broce* and denied by the district court. That rule provides, *inter-alia*: The court "may correct an *illegal* sentence at any time and may correct a sentence imposed in an *illegal* manner within the time provided herein for the reduction of sentence." Note that an *illegal sentence* may be corrected at any time. *Menna* and *Blackledge* clearly fall in that category. *Broce*, on the other hand, does not. A sentence is illegal under Rule 35 if it is in excess of the statute under which the charge is lodged, or in some other manner violative of an applicable statute. Simply stated, such a sentence is one that the judgment of conviction *does not authorize. United States v. Morgan*, 346 U.S. 502 (1954). Thus, in *Heflin v. United States*, 358 U.S. 415 (1959) the Supreme Court upheld relief afforded under Rule 35 to correct an illegal sentence. The Court set aside separate sentences imposed under 18 U.S.C. § 2113(e) involving a bank robbery. The Court set aside the sentence on the count which charged that the defendant received stolen property, holding that the subsection of the statute relied on by the Government was not designed to punish one who robs a bank, but rather one who receives the loot from the robber. Thus, unlike *Broce*, the charge was deficient for lack of subject matter jurisdiction. No fact finding process was involved. In like manner, the Court in *Prince v. United States*, 352 U.S. 322 (1957) construed a statute and, as a matter of law, held that the crime of entry into a bank with intent to rob was not a crime separate and distinct from the offense of robbery proper. This case, too, involved the construction and interpretation of a statute leading to the legal conclusion that the sentence was illegal. Congressional ~~intent~~ was carefully considered. Again, the distinction between these cases and *Broce* and *Beachner* is clear.

In *Marteney v. United States*, 216 F.2d 760 (10th Cir. 1954), we held that a 28 U.S.C. § 2255 habeas proceeding should be treated as a motion to vacate sentence and proceeded to hold that it affirmatively appeared on the face of the challenged indictment that no federal offense was committed. We there clearly distinguished between indictments which, as a matter of law, do not, *on their face*, charge an offense and those which *do not* involve jurisdictional challenges:

> A plea of guilty to an indictment is an admission of all nonjurisdictional facts alleged in the charge, and when the judgment of sentence is collaterally attacked under Section 2255, the sentencing court, indulging in the presumption of regularity *will not disturb its judgment unless the indictment or information shows upon its face that no federal offense has been committed.* We have said that "The test of the sufficiency of the indictment on a motion to vacate a sentence is whether the indictment by any reasonable construction can be said to charge the offense for which the sentence was imposed." *Byers v. United States*, 10 Cir., 175 F.2d 654, 656. See also *Pulliam v. United States*, 10 Cir. 178 F.2d 777; *Kreuter v. United States*, 10 Cir., 201 F.2d 33. . . . If, however, it affirmatively appears on the face of the indictment or information that no federal offense was committed, the charge is vulnerable to collateral attack . . . [a]nd this is so even in the face of a guilty plea, for one cannot plead

> guilty to an offense which is not affirmatively stated in the charge.

216 F.2d at 762. *See also, United States v. Donohoe*, 458 F.2d 237 (10th Cir.), *cert. denied*, 409 U.S. 865 (1972) (a guilty plea waives all nonjurisdictional defenses); *United States v. Watkins*, 709 F.2d 475 (7th Cir. 1983) (an indictment not challenged before trial will be upheld unless it is so defective that it does not, by any reasonable construction, charge an offense for which the defendant was convicted; however, an indictment which fails to state an offense is a fatal defect which may be raised at any time).

Judge Saffels, in *Beachner*, did not hold, as a matter of law, that there was any lack of subject matter jurisdiction, that the sentence beyond the scope of the statute or that the sentence was illegally imposed in violation of a statute. He set the *Beachner* sentence aside based upon, and exclusively upon, his *fact-finding determination* following a Rule 12 motion to dismiss, on the ground of double jeopardy. Following an evidentiary hearing held thereon, Judge Saffels found that there was a single, ongoing conspiracy instead of the separate, distinct conspiracies charged by the Government. There were no constitutional underpinnings involved in this finding. It was upheld by this court, on appeal, on the ground that it was not clearly erroneous.

I conclude that Judge O'Connor properly denied *Broce* Rule 35 relief.

III.
The Stipulation and the Disposition

The majority opinion may, by inadvertance, have imparted the view that the Stipulation entered into between the parties in this Rule 35 proceeding somehow bound Judge O'Connor to Judge Saffels' single, ongoing conspiracy finding in *Beachner*. Such is simply not the case. The Stipulation reads in full as follows:

> Comes now the parties and stipulate that the Court may consider the record made in the evidentiary hearing on the Motion to Dismiss filed by Beachner Construction Co., Inc. in *United States v. Beachner Construction Co., Inc., et al.*, Case No. 82-20076-01 in the United States District Court for the District of Kansas in ruling on the merits of defendants' Motion to Vacate Sentence Pursuant to Rule 35(a) in the instant case.

(R., Vol. I, p. 97.)

The court did consider the *Beachner* hearing record, as evidenced by Judge O'Connor's detailed references thereto. Nothing in the Stipulation provides that Judge O'Connor was bound by Judge Saffels' finding of a single conspiracy in *Beachner* in making his "ruling on the merits" on the Rule 35(a) motion. It is thus puzzling why the majority opinion (pages 10 and 11 of Slip Opinion) states:

> As previously indicated, the parties stipulated in the trial court that the transcript from the evidentiary hearing on the double jeopardy issue in *Beachner* would be incorporated in the record in this case. Thus, our opinion in *Beachner* must have weight here. . . .
>
> Whatever the approach taken in other cases in determining the nature of the charged conspiracy, the stipulation to include consideration of the *Beachner* transcript presents a unique case and permits us to go behind the indictment. Having conceded the applicability of the facts developed in that hearing, the government is not in the position to argue our examination of the issue must be confined to the pleadings. Can that stipulation by the government be regarded as anything but a concession on its part that

> the facts of the two cases are so interwined that one is relevant to the other in consideration of the same legal issue? We think not.

I submit that the question, as posed, implies that Judge Saffels' finding, following a Rule 12 Motion to Dismiss filed in *Beachner, based on all the facts presented at the hearing*, that a single, ongoing conspiracy, rather than multiple conspiracies was established, was binding on Judge O'Connor in the Rule 35 proceeding. That is not so.

First, even though the majority opinion *finds* that "on their face the two (*Broce*) indictments do not appear to charge different conspiracies" (Slip Opinion, p. 10), neither Judge Saffels, in *Beachner*, nor Judge O'Connor, in *Broce*, so found. Each found to the contrary. Indeed, if Judge Saffels had so found, in *Beachner*, there would have been no reason to conduct the evidentiary hearing on the Motion to Dismiss to determine the issue of the single conspiracy versus multiple conspiracies. In my view, Judge O'Connor was on target (and Judge Saffels obviously agreed) when he found that "on their faces, the indictments alleged two distinct criminal conspiracies, and the defendants pleaded guilty to each, acknowledging the validity of the facts contained in each indictment." (R., Vol. II, p. 288.)

Second, the Stipulation clearly states *only* that Judge O'Connor "may consider" the *Beachner* record made by Judge Saffels. That he did. To suggest that he was legally bound by Judge Saffels' finding is a distortion of the language of the Stipulation. I submit that Judge O'Connor would have considered the *Beachner* record regardless of the Stipulation because *Beachner* was the basis for the *Broce* Rule 35 motion. The *Beachner* record was in the same court presided over by Chief Judge O'Connor. A court may, *sua sponte*, take judicial notice of its own records and preceding records if called to the court's attention by the parties. *St. Louis Baptist Temple v.*

F.D.I.C., 605 F.2d 1169 (10th Cir. 1979); *Ginsberg v. Thomas*, 170 F.2d 1 (10th Cir. 1948). Thus to remand this case to the district court for a "hearing" to look behind the indictments appears to be an attempt by the majority to advise the district court to *apply Beachner* retroactively when the district court has already considered its effect on this case.

Third, I submit that the *only* way that *Beachner* could have controlled *Broce* in the Rule 35 proceeding is *if Beachner* had been decided prior to the acceptance of the voluntary guilty pleas entered by the *Broce* defendants. Such, however, was not the case. The *Broce* guilty pleas were entered *prior* to the *Beachner* decision rendered by Judge Saffels on the Motion to Dismiss. Thus, in order for *Beachner* to control in the disposition of the *Broce* Rule 35 proceeding, *Beachner* must necessarily be applied retrospectively.

The majority opinion does not address the issue whether *Beachner* should apply retroactively so as to render the *Broce* pleas illegal. I conclude that this is an issue because of the broad sweep of the majority holding, which seems to be either that *all* guilty pleas are subject to collateral attack or that because of the Stipulation, Judge Saffels' finding of a single, ongoing conspiracy in *Beachner* controls in the remand to the district court. I fail to see why "the Stipulation to include consideration of the *Beachner* transcript presents a unique case and permits inquiry behind the indictment" (Slip Opinion, p. 11) if the majority does not implicitly hold *Beachner* should be applied retroactively to *Broce*. Judge O'Connor did consider *Beachner*. Thus, I must ask why Judge O'Connor's consideration of the record on remand should lead to a different result unless the majority intends that *Beachner* apply retroactively? Even if we assume *arquendo*, that the *Broce* defendants' guilty pleas did not waive their double jeopardy claim and the Stipulation to consider the

Beachner record permits the district court to look beyond the face of the indictments, why should the district court find differently on remand? *Beachner*, decided after *Broce*, does not render the *Broce* indictments duplicitous unless *Beachner* is applied retroactively. Absent a holding that the indictments are facially illegal, which I do not read the majority's opinion to so hold, (nor did Judge Saffels or Judge O'Connor find), I see no reason to remand.

Because there is no infirmity in the statutes under which *Broce* or *Beachner* were indicted and convicted or any other statutory infirmity involved, the only basis upon which *Beachner* can be applied retroactively to render the *Broce* pleas invalid under the double jeopardy clause is to do so in reliance on Judge Saffels' *finding of fact* which occurred subsequent to the *Broce* guilty pleas to *facially valid indictments*. This, I submit, is in violation of the Stipulation and the rule that a voluntary, counseled plea of guilty entered following full compliance with Rule 11 constitutes an admission of facts and all elements contained in the indictment. *McCarthy v. United States*, 394 U.S. 459 (1969); *Menna, supra* at n.2.

In *Chevron Oil Company v. Huson*, 404 U.S. 97 (1971) the Supreme Court discussed the retroactive versus nonretroactive application of judicial decisions. Assuming, as I do here, that *Beachner* did announce the controlling rule applicable, i.e., that the highway bid rigging in Kansas was a single, ongoing conspiracy rather than separate conspiracies based upon the distinct contracts for each highway construction project, I do not believe that *Beachner* should be given retroactive application.

Chevron Oil Company v. Huson set forth the following test useful in determining the nonretroactive application of judicial decisions:

> In our cases dealing with the nonretroactivity question, we have generally considered three separate factors. First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed. . . . Second, . . . "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." Finally, we have weighed the inequity imposed by retroactive application for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity."

404 U.S. at 106-07 (citations omitted).

In applying the above test, I conclude: First, the *Beachner* decision did decide a factual issue of first impression whose resolution was not clearly foreshadowed, i.e., whether the highway bid-rigging contracts constitute a single, ongoing conspiracy or multiple, separate conspiracies. Second, the application of *Beachner*, based on the fact-finding process, has only a single purpose and effect and that is to control all prosecutions of highway bid-rigging contractors involved in the conspiratorial enterprise identified in *Beachner* pursued *after Beachner*. Third, it would be inequitable and unjust to void the *Broce* guilty pleas because the defendants were fully counseled and advised. The *Broce* defendants entered the guilty pleas to separate, distinct conspiracies and all parties, including Judge O'Connor, accepted the factual basis for the separate indictments; however, and in addition, the *Broce* pleas were predicated upon a *plea bargain agreement*. The fact that the guilty pleas in this case were entered pursuant to a plea bargain has a special significance. A plea agree-

ment involves *quid pro quo*. *United States v. Cross*, 638 F.2d 1375 (5th Cir. 1981). Here, the Government agreed not to charge or prosecute certain counts in exchange for the *Broce* guilty pleas. There is no challenge before us that the plea bargain was not handled by the court and counsel in full compliance with the guidelines set forth in Fed. R. Crim. P., Rule 11 (e). It is implicit that in accepting the *Broce* pleas, Judge O'Connor did not look upon the indictments as charging other than separate, distinct conspiracies. No challenge had been posited by the *Broce* defendants prior to entry of the pleas.

In *United States v. Allen*, 724 F.2d 1556 (11th Cir. 1984), following a plea bargain, the defendant pleaded guilty to four counts of an indictment and the Government dismissed thirteen counts. Thereafter, defendant collaterally attacked his conviction, on the ground that two counts he pleaded guilty to constituted only a single offense; the court held that the defendant had waived his right to contest the maximum sentence and particularly so in that he had benefitted from the dismissal of thirteen other charges and therefore could not "renege on his part of the bargain." *Id.* at 1558; *United States v. Solomon*, 726 F.2d 677 (11th Cir. 1984).

Generally, the doctrine of Double Jeopardy is that one may not be tried or prosecuted a second time for the same offense and it is essential that the second prosecution involve the same act and crime both in law and in fact. *Brown v. Ohio*, 432 U.S. 161, 165 (1977); *United States v. Dinitz*, 424 U.S. 600, 606 (1976); *United States v. Wilson*, 420 U.S. 332, 343 (1975); *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969); *Helvering v. Mitchell*, 303 U.S. 391, 399 (1938) (the Double Jeopardy Clause "prohibits merely punishing twice, or attempting a second time to punish criminally for the same offense").

I respectfully submit that *Broce* was not subjected to the bar of Double Jeopardy. In an evidentiary sense, the Double Jeopardy Clause comes into play as "to preclude retrial after reversal of a conviction only when the appellate court has set aside the conviction on the ground that the evidence was legally insufficient to support conviction." *Tibbs v. Florida*, 457 U.S 31 (1982); *United States v. Di Francesco*, 449 U.S. 117 (1980).

I would affirm the trial court's order denying defendants' motion to vacate the judgment of conviction pursuant to Fed. R. Crim. P. 35(a).

83-2558-U.S.A. v. BROCE CONSTRUCTION COMPANY, INC., et al

DOYLE, Circuit Judge, dissenting

I respectfully dissent from the majority opinions.

Preliminary Statement

This is a case in which the United States of America prosecuted Broce Construction Company and its President, Raymond C. Broce. The defendants plead guilty to two counts of conspiracy in restraint of trade, in violation of the Sherman Act, 15 U.S.C. § 1. Ray Broce also plead guilty to one count of mail fraud, 18 U.S.C. § 1341. Broce received a two year prison sentence and $101,000 in fines, $50,000 per conspiracy and $1,000 for the mail fraud conviction. Broce Construction was required to pay $1,500,000 in fines, $750,000 per conspiracy. The contention of the defendants is that these two conspiracies were so connected that they must be considered as a single conspiracy, an argument which is an important issue in the case. We maintain that there are two transactions and two conspiracies.

The fines are claimed to be in violation of the double jeopardy clause of the Fifth Amendment of the Constitution. The argument is that the defendants are being punished twice for a single offense. Another issue raised here is whether or not the defendants waived their double jeopardy claim by entering pleas of guilty to both of the conspiracy charges.

The Indictments

The first indictment was filed November 17, 1981 in the United States District Court for the District of Kansas, Case No. 81-20119-01. This charged the appellants in this case and Gerald R. Gumm, an employee of the company, with conspiracy to violate the Sherman Act, 15 U.S.C. § 1, and mail fraud, 18 U.S.C. § 1341, in connection with Project No. 23-60-RS-1080(9), a federal aid highway project let by the State of Kansas.

On February 4, 1982, a second indictment, Case No. 82-20011-01, was returned by the same grand jury, charging the appellants with conspiracy to violate the Sherman Act, 15 U.S.C. § 1. The latter Project No. KRL 29-2(26), was a public highway project also let by the State of Kansas (R.O.A. Vol. 1, p. 1). For purpose of this dissent the indictment filed on November 17, 1981, is referred to as Indictment 1 and the indictment filed on February 4 is treated as Indictment 2.

The present appeal concerns only the conspiracy in violation of the Sherman Act charged in Count I in Indictment 1, and the Sherman Act conspiracy in Indictment 2. The defendants seek to ignore the proposition that Indictment 2 is a separate and distinct claim. Their reason for this is that they have learned that the only possible door which could bring about a refund of the money paid as a fine would be by way of regarding the two indictments here considered as a single transaction, a conclusion which is not tenable. It was only after Mr. Broce had served his prison term that the idea of treating the two conspiracies as one transaction came to the surface. They claim that if there is but one transaction the fine should be returned. The theory is entirely new in a criminal case. These two transactions are not related so as to link these two projects. They have independent construction programs. Also they do not come together. They were some distance apart.

They would have us look back to a two year old plea of guilty which they say caused the payment of the $750,000 fine. It is said to have been a mistake of law the affect of which could result in being fined twice for one violation. They maintain that the two indictments are one transaction even though they are set forth in two transactions which do not pretend to be one.

We hold that the one transaction theory is invalid; and that these are clearly independent transactions. This single transaction idea was an afterthought. The defense has contended ever since Mr. Broce finished his prison term that it was a single transaction, as the result of which they claim that they are entitled to have returned their money paid as a fine in the second transaction. The effort to thus create a "single" transaction has no support in the cases or in the facts developed.

Appellants would have us look back two years to the plea of guilty and the $750,000 fine. They contend that this plea was the result of a mistake of law which should be recognized and the $750,000 should be restored. But even if the defendants have lost interest in this second indictment, we have not. Nor should we give them an *ex post facto* restoration which was also the product of afterthought. To consider this it would be necessary to find that the plea of guilty was unlawful and void. This is hard to accept in the present circumstances inasmuch as the plea of guilty was accepted by Broce as part of a plea bargain.

The Pleas of Guilty

On February 8, 1982 the appellants entered pleas of guilty in accordance with a plea bargain entered into between the defendants and the United States. (R.O.A. Vol. 2, p. 167) Defendant Ray C. Broce plead guilty to both counts of Indictment No. 1 and to Indictment No. 2. Broce Construction Company, Inc. plead guilty to Count I of Indictment No. 1 and Count I of Indictment No. 2

(R.O.A. Vol. 2, pp. 168-169). The defendant Broce, individually and on behalf of Broce Construction Company, affirmatively was advised of and waived rights to a speedy trial by jury, the right to compulsory process, and to cross-examination and the right against self-incrimination. No affirmative mention was made nor was any affirmative waiver given to the defendant's Fifth Amendment rights against double jeopardy.

Sentence was pronounced in case number 1 on March 15, 1982. At that time the corporation was fined the sum of $750,000 on each charge for a total of $1,500,000. The fines were to have been paid one-third by December 31, 1982, one-third by December 31, 1983 and one-third by December 31, 1984. The defendant Ray C. Broce personally was fined the sum of $50,000 and was sentenced to two years imprisonment on Count I of Indictment No. 1. On Count II of Indictment No. 1 he was fined the sum of $1,000 and sentenced to two years of imprisonment to be served concurrently with the sentence on Count I. On Indictment No. 2 defendant Broce was fined the sum of $50,000 and was sentenced to two years imprisonment to run concurrently with the sentences in Indictment No. 1. The fines were committed fines which were to have been paid immediately prior to the defendant's release from incarceration (R.O.A. Vol. 2, p. 203).

The Motion To Vacate the Judgment

On February 22, 1983, the defendants Broce Construction Company and Ray C. Broce filed a Motion to Vacate the Judgment and Sentence of the trial court in Indictment No. 2. Case No. 82-20011-01 (and to do away largely with the plea bargains), under the provisions of Federal Rules of Criminal Procedure 35(a). The judgment and sentence were alleged to have been illegal in that they violated the double jeopardy clause of the Fifth Amendment to the Constitution of the United States. The contention of

Broce Construction Company, Inc. was that the total of $1,500,000 in fines was illegal because it exceeded the $1,000,000 which they insist is the maximum amount if there was only one transaction rather than two (R.O.A. Vol. 1, p. 34 and Vol. 2, p. 212). The allegation of the appellants was that the two indictments presented, although purporting to charge two separate conspiracies, actually charged separate parts of a single overall conspiracy (R.O.A. Vol. 1, p. 34 and Vol 2, p. 212).

The United States government filed a response to appellants' motions on March 21, 1983. Most of its argument was that the appellants had waived their rights to raise double jeopardy by pleading guilty to both indictments. The government's argument concerning the actual basis for the motion was contained in one sentence: "The charges in the Broce indictments are not multiplicious on their face or in fact."

Defendant's theory in this appeal was inspired by a recent district court opinion by Judge Saffels in a similar case, *United States v. Beachner Construction Co., Inc.* Beachner had been acquitted of one bid-rigging conspiracy (Beachner I) and the government brought another indictment against them on a similar charge (Beachner II). Beachner urged the court to dismiss the record indictment on double jeopardy grounds. Judge Saffels found that the Beachner I and II indictments were different manifestations of a single conspiracy, that being because they described the same conspiracy. The Beachner II indictment named Jerry Beachner rather than Robert Beachner and Beachner II specified three different highway projects. Nevertheless Judge Saffels found that the conpiracies charged in Beachner I and Beachner II were merely separate parts of a single larger and on-going bid rigging conspiracy which had continued for several years. That opinion adopts the the contractors' position. In no way does it stand out as a precedent for this court. This led to

adoption of a similar theory in this case even though the facts and their aspects were wholly different.

The court held a hearing on the motion to vacate in the instant case on May 1, 1983. At that time the motion was taken under advisement. The court denied the motion and memorandum and order dated November 18, 1983, and held that the double jeopardy claim had been waived (R.Vol.1, pp. 100-112 and Vol. 2, pp. 278-290). This appeal was timely filed on November 28, 1983 (R.O.A. Vol. 1, p. 113 and Vol. 2, p. 291).

The question here is whether the double jeopardy clause of the Fifth Amendment of the United States Constitution was violated in that Ray C. Broce and Broce Construction Company, Inc. were punished twice for a single offense.

The result to the double jeopardy claim of entering a plea of guilty to the conspiracy charge is to add more fuel to the original fire. The fact that a plea of guilty was entered results in confirming by the defendants of both transactions.

There is no great dispute about the double jeopardy clause of the Fifth Amendment prohibiting infliction of multiple punishment for the same offense. There is essentially no dispute that if these indictments reflected one conspiracy that the appellant is not to be punished twice. The essence of *this* appeal is that the two transactions were actually divided into two sub-parts, one procedural and one factual.

First, the procedural question: Did the defendants waive their claims to double jeopardy?

Second, do the facts admitted by the appellant in pleading gulity allow this court to find that there was only one conspiracy, rather than two?

Waiver of the Double Jeopardy Claim

The general rule on waiver of constitutional claims is that a defendant waives all objections of a constitutional

nature when he voluntarily and knowingly enters a plea of guilty. *Tollett v. Henderson,* 411 U.S. 258. "[A] guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." Id at 267.

The leading case concerning waiver of the double jeopardy provisions of the Fifth Amendment to the Constitution is *Menna v. New York,* 423 U.S. 61 (1975) (per curiam). In that case Menna had refused to answer questions before a New York State Grand Jury after a grant of immunity. He was adjudged in contempt and sentenced to 30 days in jail. This he served. Approximately ten years later he was indicted for the same conduct. After asserting unsuccessfully, in state court, that the indictment violated the double jeopardy prescription of the Fifth Amendment, he pleaded guilty to the indictment. He then appealed again raising the double jeopardy claim. The New York Court of Appeals declined to address the double jeopardy claim on the merits, holding that it had been waived by Menna's counseled plea of guilty.

The United States Supreme Court reversed in a per curiam decision which held that where the state is precluded by the United States Constitution from hauling a defendant into court on a charge, federal law requires that conviction on that charge be set aside even if conviction was entered pursuant to a counseled plea of guilty. The question is whether this holding is proper authority for the proposition that a claim of double jeopardy is not defeated by an intervening plea of guilty. The decision is confused by the court's statement in Footnote No. 2 to its decision. The Supreme Court ruled that it "did not hold that a double jeopardy claim may never be waived, but

simply held that a plea of guilty to a charge does not waive a claim that—judged on its face—the charge is one which the state may not constitutionally prosecute."

In the instant case the defendants engaged in widespread plea bargaining. They paid a $750,000 fine. Two years later the defendant tried to renege two years after paying. It was argued by the defendants that they were charged twice. This was based on a new idea that he could challenge the plea of guilty—that he was entitled to challenge the validity of the $750,000 fine. The defendants seem to believe that they are free to renounce their plea of guilty. But the plea of guilty is a solid agreement to stand by the plea bargain. They cannot successfully decide to walk away from the plea of guilty which served so well before. It is not subject to walking out such as is being allowed by the majority here.

The majority of the circuit has not come to grips with the various features of double jeopardy. However, it seems likely that it would follow the fundamentals. Seemingly it would follow the principle that a plea of guilty is an admission of the elements and material facts of the formal criminal charge contained in the indictment. *See McCarthy v. U.S.* 394 U.S. 459. All non-jurisdictional defects are accepted.

The Court in *Menna* left unanswered the question of what constitutes a valid waiver of the Fifth Amendment claim and whether or not a plea of guilty to a charge which is not multiplicious on its face constitutes a waiver of the double jeopardy claim. The court did indicate in the same footnote that a counseled plea of guilty is an admission of factual guilt so reliable that it validly removes the issue of factual guilt from the case.

This circuit has no extraordinary knowledge to address these questions. At the same time other circuits have taken opposing positions. The Fifth and Ninth Circuits have had no trouble holding that a guilty plea does not result in the

waiver of a double jeopardy claim. *United States v. Broussard,* 645 F.2d 504 (5th Cir. 1981); *Launius v. United States,* 575 F.2d 770 (9th Cir. 1978). This Ninth Circuit decision indicates that a waiver of a double jeopardy claim *must* be a waiver as defined in *Johnson v. Zerbst,* 304 U.S. 458 (1938). There the court defined a waiver as the knowing relinquishment or abandonment of a known right or privilege. The Eighth and Second Circuits have ruled that a claim of double jeopardy is non-jurisdictional and is waived if not timely and effectively pleaded. *United States v. Herzog,* 644 F.2d 713 (8th Cir. 1981); *McClain v. Brown,* 587 F.2d 389 (8th Cir. 1978); *United States v. Perez,* 565 F.2d 1227 (2nd Cir. 1977). These decisions thus seem to conflict with the decision in *Menna, supra.* The court below nevertheless chose not to apply the waiver theories of either the *Launius* or *Herzog* line of cases. Rather the court chose as controlling the opinion in *Kerrigan v. United States,* 644 F.2d 47 (1st Cir. 1981). It stated that the case more closely resembled the facts and issues in terms of the instant one.

In *Kerrigan* two separate indictments which conspired to transport stolen merchandise in interstate commerce. In the first indictment it was averred that Kerrigan, Kirkwood and a third person, Lambert, had conspired and agreed to transport lithographs stolen in Boston, Massachusetts during a period of time between August 25, 1977 and September 1, 1977. The second indictment alleged that Kerrigan and Kirkwood conspired and agreed to transport jewelery stolen from West Dennis, Massachusetts during a time between September 1, 1977 and September 22, 1977. The court held that despite the holdings and findings in *Menna* and *Launius,* a defendant who had pleaded guilty to indictments which did not on their face charge multiple conspiracies could not waive a double jeopardy claim after a plea of guilty.

The court reasoned that the court in *Launius* had stated that "by pleading guilty the defendant admitted the facts alleged in the information." The court further proceeded to hold that after pleading guilty a defendant is precluded from contesting the factual or theoretical basis of the charges. The addition of the theoretical basis for the charges is the court's own. Neither *Menna* nor *Launius* contained any language pertaining to this theory behind the government's case, even though both state that a plea of guilty admits facts alleged.

In *Kerrigan* the court proceeded to analyze the indictment according to tests for double jeopardy in conspiracy cases. In *United States v. DeFillipo,* 590 F.2d 1228 (2nd Cir. 1979), the relevant factors examined were the dates of the purported agreements, the identity of each of the alleged conspirators, and the specific criminal acts to the commission of which the defendants were alleged to have agreed. The court found that based on these factors the two indictments were not multiplicious on their face.

In closing it is fair to conclude that a defendant who waives all facts in effect accepts them. Such a man generally must proceed with the burden of the facts.

One Conspiracy From Two

It is apparent from the above that the defendants depend on the similarity of the form of the contracts in question. Thus, they say that these contracts are the same; a part of the same conspiracy. They argue that as a result of their calling the two contracts one contract that they automatically assume this character. They neglect the positive facts which point to each contract having an individual character. They were entered at two separate times and in two separate places. In fact the roads involved are located at different places and are not connected. The fact that the two contracts are similar in form has no consequence. Lawyers are noted for utilizing a

form. Therefore, the fact that the two contracts are similar does not suggest that they are identical. It could be said that the second contract was copied from an earlier existing contract. When the second contract was executed the company pursued and obtained another independent job. No amount of wishing can change this fact.

Part of the defendants' position is that the sentences of the defendants Ray C. Broce and Broce Construction Company, Inc., are in violation of the double jeopardy clause of the Fifth Amendment of the United States Constitution on the ground of multiplicity in that they are being punished twice for a single offense. There are so many features that demonstrate that these two indictments were based on individual transactions.

There are several reasons for this being two transactions. First, these transactions had different contracts. If they had wished to have a single contract they perhaps could have brought about a less damaging result by referring in that to the various provisions instead of writing a brand new contract. Surely these businessmen know that one does not write two contracts for one transaction.

Second, such contracts conceivably could be part of one transaction if they both pertained to the same highway. They do not. The two highways are in completely different geographical locations.

Third, several months passed between the completion of contract number one and the undertaking of contract number two. This chronological gap implies that there were two transactions.

Fourth, this also persuades that they were not thinking at the time of the various signings that this was just one transaction. This being the case if there had been an effort to keep it under one roof there would have been only one agreement for the two roads.

It appears that these two projects fell short of being one. The double aspect was clearly an after-thought which was

brought about two years too late to be of service to these defendants. How could the defendants demand their money back after two years has passed? The district court, Judge O'Conner, reached the conclusion that these were two distinct transactions and thus the defendant was not punished twice. Finally, the defendants tried to cure the problem by saying that one conspiracy permeated the entire work of Broce Co. But a careful examination of the two contracts reveals that they clearly represent distinct transactions. The "conspiracy" came to life long after the creation of the contracts. Although it seemed to have been brought to the surface in an effort to establish the double jeopardy claim. But it fails.

The Conclusion

The record reveals that the defendants waived any and all rights under the double jeopardy clause. This came about when the defendants agreed to voluntary pleas of guilty. It was not until Broce's release from prison that they came forward with their present claims. But even if their rights under the double jeopardy clause were not waived, the guilty pleas admit the facts in the indictments, both of which plainly acknowledge two separate conspiracies. Not only that, the facts readily reveal that under no theory could their conduct be ruled to be part of a single larger conspiracy. The attempt by the defendants to put forth a single larger conspiracy fails miserably. The trial court saw through their efforts to restore a past which itself fails. The result that they seek does not emerge.

The argument is that Broce has continuously been in a conspiracy the object of which was to realize excessive gain at the expense of Kansas and United States taxpayers. The defendants here do not hesitate to acknowledge this. This demand seeks to undo the payments which the court assessed as punishment for their misdeeds.

To allow them to obtain this is contrary to law including not only laws of Congress, but also the United States Constitution.

In addition it would set a precedent which could allow courts to disregard the United States laws in favor of their own ideas. The judge in this case rejected these efforts and upheld the law. To accept the position of the majority would favor these defendants and would create a system which tolerates the undoing of pleas of guilty. This at least would weaken the system of law which was adopted in 1789. Besides the general developments here suggested, it would leave a system which criminals could manipulate according to their will and their money.

Finally, no laws or rules could justify a result which holds out a consequence which they here demand. More violations can be expected if the criminals can apply that which they wish rather than that which they agree to.

APPENDIX

Count I of Indictment 1 consists of fifteen numbered paragraphs divided into seven sections designated by I through VII. Section I is headed "Definitions" and consists of Paragraph 1 which is divided into three sub-paragraphs, (a), (b), (c). The sub-paragraphs define the terms "highway construction", "highway construction contract" and "federal-aid highways", respectively. Section II is entitled "defendants" and consists of Paragraphs 2 and 3. Paragraph 2 alleges that Ray C. Broce is President and Gerald R. Gumm is General Manager of Broce Construction Company. The paragraph further identifies that Broce Construction Company is a corporation organized under the laws of the State of Kansas which does business particularly at Dodge City, Kansas. Paragraph 3 states that any reference to an act of a corporation means that the corporation acted through its officers or agents, etc.

while they were actively engaged in the management, etc. of a corporation.

Much of the remaining space is devoted to the similarity in wording of the various provisions in each indictment. It proves little if anything. It repeats and repeats more of the materials in the two indictments.

Section III is entitled "co-conspirators" and consists of Paragraph 4 only. This latter paragraph states that various persons and firms not made defendants participated as co-conspirators in the offense charged and performed acts and made statements in furtherance thereof.

Section IV is entitled "trade and commerce" and it consists of five paragraphs.

Paragraph 5 asserts that federal aid highways, including the highway which is the subject of the indictment, are part of a nationwide network of inter-connecting highways over which interstate commerce is conducted.

Paragraph 6 states that there exists under the Federal Aid Highway Act, 23 U.S.C. 2d 101, *et seq.*, a cooperative effort on the part of states and the federal government, including the State of Kansas, for the development and construction of highways, including the highway which is the subject of this indictment.

Paragraph 7 alleges that the State of Kansas during the time period of the indictment sought sealed competitive bids from highway construction contractors.

Paragraph 8 states that Kansas requires that highway projects over $1,000 be bid competitively. Paragraph 9 explains that Kansas bidding regulations require a statement of non-collusion in it. Paragraph 10 states that materials travelling in interstate commerce were used in Kansas highway projects including the one which is the subject of the indictments. To say that the Kansas bidding regulations require a statement of non-collusion in each bid is superfluous inasmuch as there is nothing but collusion throughout all of these briefs. They have undertaken to set

forth all of the contractual matters; but at the same time they allege that these were evidences of collusion. At the same time they back away from this conclusion any time a law violation comes into view. Unquestionably the appellants and Gerald R. Gumm and others unknown conspired to suppress and eliminate competition for the construction of Kansas Highway Project No. 23-60-R.S.1080 (9) in violation of the Sherman Act (15 U.S.C. § 1).

Paragraph 12 states that the conspiracy was set forth in the agreement. It alleges that there was understanding and concert of action among conspirators. The substantial terms of a conspiracy were (a) to allocate the construction project named to Broce Construction Company; (b) to cement collusive, non-competitive and rigged bids to the State of Kansas in connection with the project. Paragraph 13 alleges that overt acts were committed. These included (a) discussing the submission of bids on the projects; (b) designating the successful low bidder on the project; (c) the submission of intentionally high bids by co-conspirators; (d) submitting bids containing false, fictitious and fraudulent statements and entries; and (e) discussing the submission of prospective bids on other projects let by the State of Kansas on April 25, 1978. (R.O.A. Vol. 2, pp. 139-140)

Section VI is labeled "effects" and it consists of Paragraph 14. This latter sets forth among other effects of the conspiracy: (a) that it caused the prices for the project to be maintained as artificial and non-competitive levels; (b) that it caused competition in the construction of the project to be eliminated; (c) that it caused the State of Kansas to be denied the right to receive competitive bids on the project; and (d) that it caused the State of Kansas and the United States to be denied the benefits of competition on the project. In other words, the showing is unmistaken inasmuch as it establishes a violation of the Sherman Act and admits it with candor. Thus the conspiracy was de-

signed in order to avoid the law; the Sherman Act. The object was to set aside the Sherman Act in favor of a small group of contractors who do not compete. Their effort is to fix prices among the selected few. The United States Government sought to prosecute these participants and the litigation by the contractors simply ignores this effort.

Another part, Section VII, is entitled "jurisdiction and venue". It undertakes in Paragraph 15 to reveal that the conspiracy was formed and carried out within the District of Kansas during five years following the return of the indictment. (R.O.A. Vol. 2, p. 140)

Count II of Indictment No. 1 is not primarily involved in this appeal and accordingly, there is nothing to be gained by summarizing it.

Indictment No. 2 is organized with great care. It has seven sections designated by roman numerals. The section headings are identical to those in Indictment No. 1. That is as far as the similarity goes. The indictment consists of fourteen numbered paragraphs. Section I entitled "definitions" consists of Paragraph No. 1 which is divided into sub-paragraphs (a) and (b), which define the term "highway construction" and "highway construction contractor", respectively. (R.O.A. Vol. 1, p. 1) The definitions of those terms are identical to the definitions given in Section I of Indictment No. 1, the only difference in the two sections being that Indictment No. 2 fails to define the term "federal-aid highways."

Section II entitled "defendants" consists of Paragraphs 2 and 3 (R.O.A. Vol. 1, pp. 1-2). Paragraph 2 is identical to the same paragraph in Indictment No. 1 except that it contains no reference to Gerald R. Gumm. Paragraph 3 is exactly identical to Paragraph 3 of Indictment No. 1.

Section III is entitled "co-conspirators" and consists of Paragraph 4. (R.O.A. Vol. 1, p. 2) Section III is identical to Section III of Indictment No. 1.

Trade and Commerce

Section IV which is entitled "trade and commerce" consists of Paragraphs 5 through 9. (R.O.A. Vol. 1, pp. 2-3) Paragraph 5 is identical to Section IV, Paragraph 5 of Indictment No. 1, except that it begins with the words "public highways", instead of the words "federal-aid highways". This feature does not lack truth. The term "federal-aid highways" is correct because federal aid was exactly what it was. Undoubtedly federal money was the important object in the entire project.

Paragraph 6 is identical to Section IV, Paragraph 7 of Indictment No. 1. Paragraph 7 is identical to Section IV, Paragraph 8 of Indictment No. 1. Paragraph 8 is identical to Section IV, Paragraph 9 of Indictment No. 1. Paragraph 9 is identical to Paragraph 10 of Indictment No. 1. The only major difference between Sections IV of the two indictments is that Indictment No. 1 contains a paragraph describing state and federal cooperation under the Federal Aid Highway Act (15 U.S.C. § 101, *et seq.*). *See* Paragraph 6 of Indictment No. 1.

Indictment No. 2 deals with a completely different area for the building of the highway and it uses various headings and discussions. Thus Section V of Indictment No. 2, entitled "offense charged" consists of Paragraphs 10 through 12 of the indictment. Paragraph 10 is identical to Paragraph 11 of Section V of Indictment No. 1 except for the project number. In Indictment No. 2 the project number is K.R.L. 29-2(26); the date of the bid letting, July 17, 1979. The description of the project as a "public highway project" rather than a "federal-aid highway project", and the date of commencement of the conspiracy, in or about July, 1979. Paragraph 11 is identical to Paragraph 12 of Indictment No. 1 except for the project number and date of letting in sub-paragraph (a) and the

reference to the project as a "public highway project", rather than a "federal-aid highway project."

Paragraph 12 of Indictment No. 2 is identical in charging overt acts in furtherance of a conspiracy in Paragraph 13 of Indictment No. 1. The exception is referring to the different project numbers, sub-paragraph (e) being the only exception. Indictment No. 2, sub-paragraph (e) alleges a discussion of the payment of consideration to another contractor and in Indictment No. 1, sub-paragraph (e) alleges the discussion of the submission of bids on other projects.

Section VI entitled "effects" consists of Paragraph 13. (R.O.A. Vol. 1, page 5) It has identity to Section VI of Indictment No. 1 except for the desciption of the project as a "public highway project" rather than a "federal-aid highway project", and there is the elimination of a reference to the United States in sub-paragraph (d).

Section VII is entitled "jurisdiction and venue" and consists of paragraph 14 of the indictment. (R.O.A. Vol. 1, p. 6) Section VII of Indictment No. 2 is identical to Section VII of Indictment No. 1.

APPENDIX D

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 83-2558 & 83-2559

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

v.

RAY C. BROCE AND BROCE CONSTRUCTION CO., INC.,
DEFENDANTS-APPELLANTS

Appeal from the United States District Court
For the District of Kansas
(D.C. Nos. 82-20011-01 and 81-20119-01)

[Filed: Jan. 9, 1985]

Before: SETH and DOYLE, Circuit Judges, and BOHANON, Senior District Judge.*

*Honorable Luther Bohanon of the United States District Court for the Northern, Eastern and Western Districts of Oklahoma, sitting by designation.

BOHANON, District Judge.

Broce Construction Co. and Ray C. Broce (hereinafter "defendants") appeal from an order of the United States District Court for the District of Kansas denying their motion to vacate the judgment and sentence entered by that court March 15, 1981, in one of the two cases combined here on appeal. Defendants claim that the judgment and sentence in question are in violation of the Double Jeopardy Clause of the United States Constitution. The district court, without making a finding as to whether the two sentences did in fact violate the Double Jeopardy Clause, found that defendants had waived their rights to raise that issue by pleading guilty to the indictment supporting the judgment and sentence challenged. The central issue on appeal is whether the trial court's finding of waiver was erroneous.

Defendants were indicted by a grand jury in Case No. 83-2559 (No. 81-20119-01 below) on November 17, 1981. That indictment charged, in Count I, violations of the Sherman Act, 15 U.S.C. § 1 (1976), and, in Count II, violation of the mail fraud statute, 18 U.S.C. § 1341 (1976), in connection with a conspiracy to rig bids submitted to the State of Kansas on a particular highway construction job, designated by the State as Project No. 23-60-RS-1080(9) and let for bidding on April 25, 1978. The mail fraud count of this indictment is not involved in this appeal and will not be discussed further.

On February 4, 1982, the same grand jury returned a second indictment against defendants in Case No. 83-2558 (No. 82-20011-01 below) charging violation of the Sherman Act in connection with a conspiracy to rig bids on yet another Kansas highway construction job, designated Project No. KRL 29-2(26) and let by the State on July 17,

1979. Threatened by government prosecutors with a series of further indictments for each highway project believed to have been rigged, defendants accepted a plea bargain wherein they agreed to plead guilty to two indictments charging conspiracy to violate the Sherman Act in exchange for the government's promise not to prosecute them "for or on account of any collusion between defendant[s] and other contractors regarding any other highway, street or airport runway construction projects let by awarding authorities within the States of Kansas and Oklahoma prior to the date" of the plea bargain. (ROA at 150).

Accordingly, on February 8, 1982, defendants entered pleas of guilty to both pending indictments. At that time, Mr. Broce, appearing both on his own behalf and on behalf of the corporation, was advised of and waived both defendants' rights to be represented by separate counsel, to have a speedy and public trial by a jury, to cross-examine all opposing witnesses, to utilize compulsory process, to be free from compelled self-incrimination, and to be presumed innocent until the government established guilt by competant evidence to the satisfaction of the judge or jury beyond a reasonable doubt. The record of these proceedings does not disclose, however, that Mr. Broce was at any time advised of his and the defendant corporation's double jeopardy rights or that these rights were ever considered by any party to the proceedings. Subsequently, on March 15, 1982, sentence was pronounced in both cases; Broce Construction Co. received a $750,000 fine for the antitrust count in each case, for a total fine of $1,500,000, and Ray C. Broce received a $50,000 fine and two years inprisonment for each antitrust charge, the two 2-year prison terms to run concurrently. Mr. Broce paid his $100,000 total fines on June 2, 1982, and has already completed his prison terms. Broce

Construction Co. was allowed to pay its fines in installments and still owes a substantial sum despite timely payments.

On February 22, 1983, the defendants, pursuant to F.R.Crim.P. 35(a),[1] filed a motion to vacate the judgment and sentence of the trial court in the second-filed case (here No. 83-2558) claiming that the judgment and sentence therein were illegal for violation of the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution. This motion was prompted by a memorandum and order filed on January 31, 1983, in a similar case in the same judicial district, *United States of America v. Beachner Construction Co., Inc.*, 555 F. Supp. 1273 (D. Kan. 1983), *affirmed* by this court, 729 F.2d 1278 (1984). In that case, District Judge Saffels found, after an evidentiary hearing, that a second prosecution, for conspiracy to rig bids on Kansas highway construction projects, of defendants who had previously been acquitted by a jury under an indictment differing from the second only with respect to the specific named project and other irrelevant matters, was contrary to the Double Jeopardy Clause. Defendants in the instant case claim that, as in *Beachner,* the second indictment filed against them, though purporting to charge a separate conspiracy than the charged in the first indictment by naming a different construction project, in fact did no more than again draw them into jeopardy for another part of a single overall conspiracy. The district court below found, however, that by pleading guilty to both indictments defendants had admitted the facts and theory alleged in the indictments, that these indictments did not on their faces give rise to a double jeopardy claim, and that the defendants had effectively waived their right to raise a double jeopardy claim based upon any version of the facts differing from that admitted

[1] Fed.R.Crim.P. 35(a) provides that "The court may correct an illegal sentence at any time . . ."

by their guilty pleas. In effect, the district court left open, without deciding, the possibility that the sentences imposed for the second indictment did in fact, if not on the face of the indictment, violate the double jeopardy clause, but determined that even if the sentences were so illegal, the defendants had waived by pleading guilty their right to challenge the sentences on that basis.

The fundamental rule of law which, *ceteris peribus*, would govern this case is that "a single continuing conspiracy, however diverse its objects, cannot be broken down into component subagreements for the purpose of multiple punishments or multiple prosecutions." *United States v. Tanner*, 471 F.2d 128, 141 (7th Cir. 1972) *citing Braverman v. United States*, 317 U.S. 49 (1942); *cf. Sanabria v. United States*, 437 U.S. 54, 72 (1978); *Brown v. Ohio*, 432 U.S. 161, 169 (1977).[2] The evidentiary corollary states that "[w]hen . . . the separate conspiracies [alleged] are both founded upon a general conspiracy statute, the relevant inquiry is whether there existed more than one *agreement* to perform some illegal act or acts. *Ward v. United States*, 694 F.2d 654, 661 (11th Cir. 1983)" (emphasis in original).

We are confronted at the outset, however, with the question of what effect, if any, the defendants' guilty pleas have on the applicability of these general rules. Well-established precedent in this circuit prescribes that a guilty plea by a defendant waives his right to challenge his consequent sentence on the grounds of double jeopardy. This

[2] Lest we go adrift in what one Supreme Court justice has termed "a veritable Sargasso Sea which could not fail to challenge the most intrepid judicial navigator", *Albernaz v. United States*, 450 U.S. 333, 343 (1981), this case should be distinguished from one in which the government has alleged that a single transaction violates two distinct conspiracy statutes. *Id., American Tobacco Co. v. United States*, 328 U.S. 781 (1946). Here it is clear that only one conspiracy statute, 15 U.S.C. § 1, is involved and that the government has alleged repeated violations of it.

rule was clearly spelled out in the following language from *Caballero v. Hudspeth*, 114 F.2d 545, 547-48 (10th Cir. 1940):

> The two counts of the indictment stating but a single offense, it follows that petitioner suffered double jeopardy under the sentence of the court.
>
> The question of double jeopardy may not, however, be raised by petitioner in the present proceeding. On June 7, 1937, petitioner withdrew his former plea of not guilty and entered a plea of guilty to both counts of the indictment. No objection was raised at any stage of the proceedings to the sentence of the court. *The right to not be placed in jeopardy twice for the same offense is a personal right. It is an immunity granted to the citizen by our constitution and may be waived. The plea of guilty by the defendant constituted a waiver of this right.* At no stage of the proceedings did he assert this constitutional guarantee. The defense may not now be raised for the first time by writ of habeas corpus. Brady v. United States, 8 Cir., 24 F.2d 399; Curtis v. United States, 10 Cir., 67 F.2d 943; United States ex rel. Poch v. Hill, 3 Cir., 71 F.2d 906, 907; Bracey v. Zerbst, 10 Cir. 93 F.2d 8.

(emphasis added). As recently as *Cox v. Crouse*, 376 F.2d 824, 826 (10th Cir. 1967) this court stated:

> We find it unnecessary to decide whether Cox, by rearraignment on the original kidnapping charge, was again placed in jeopardy for an offense of which he had been acquitted. Here the appellant pled guilty after his rearraignment and thereby waived his defenses to the charge, including, but not by way of limitation, the defense of double jeopardy.

Indeed, cases in support of this view of the double jeopardy right were legion from all jurisdictions prior to 1975.

See e.g., cases cited in *Brady v. United States*, 24 F.2d 399, 405 (8th Cir. 1928).

This line of cases, however, was supported only by scant and oblique citation to Supreme Court precedent and its validity has been drawn into question in recent years by the High Court's opinions in *Blackledge v. Perry*, 417 U.S. 21 (1974) and *Menna v. New York*, 423 U.S. 61 (1975). In *Green v. Estelle*, 524 F.2d 1243 (5th Cir. 1975), for example, the Fifth Circuit reversed a district court decision that expressly relied upon the above-cited portion of *Cox v. Crouse* because it found the *Menna* decision, handed down while *Green* was pending before the circuit, to be controlling. *Id.* at 1244. Though *Caballero* has been cited by this court as established, though not dispositive, precedent as recently as 1978, *United States v. Rich*, 589 F.2d 1025, 1032, 1033, we have never had occasion to consider the continuing validity *vel non* of *Caballero* in the light of *Blackledge* and *Menna*. From the discussion which follows, we feel it is clear that *Caballero* can no longer stand and must be overruled.

Blackledge is not actually a double jeopardy case. Though the respondent there had claimed that his double jeopardy right was infringed, the court did not reach that issue, deciding the case instead on due process grounds. The case involved a criminal defendant in North Carolina who exercised his right to a trial *de novo* on appeal to a County Superior Court after conviction for a misdemeanor offense in the County District Court. After he filed his appeal, but before the trial *de novo* was held, Perry, the defendant, was indicted on a felony charge based upon the same conduct involved in his earlier misdemeanor conviction. Perry pled guilty to the felony charge and was sentenced to five to seven years in the penitentiary. The case came before the Supreme Court on subsequent habeas proceedings. The Court first held that the potential for prosecutorial vindictiveness inherent in North

Carolina's treatment of Perry rendered the filing of the felony indictment a violation of due process. Then the Court addressed the issue of whether Perry's guilty plea to that indictment had waived his right to raise the due process issue in federal habeas corpus proceedings.

The Court directly addressed the government petitioner's reliance upon earlier cases in which a guilty plea had been found to waive certain constitutional rights, namely, *Tollett v. Henderson*, 411 U.S. 258 (1973) and the so-called "Brady trilogy:" *Brady v. United States*, 397 U.S. 742 (1970), *McMann v. Richardson*, 397 U.S. 759 (1970), and *Parker v. North Carolina*, 379 U.S. 790 (1970). Two of these cases, *Brady* and *McMann*, have also been used by the government in the instant case to support its claim that that the present defendants are precluded from raising their double jeopardy claims now. Because the Court's discussion of the "fundamental distinction" between the rights involved in those cases and that invoked by Perry in *Blackledge* reveals a conceptual difference of paramount importance for understanding the Double Jeopardy Clause, it is quoted here at length:

> While petitioner's reliance upon the *Tollett* opinion is understandable, there is a fundamental distinction between this case and that one. Although the underlying claims presented in *Tollett* and the *Brady* trilogy were of constitutional dimensions, none went to *the very power of the State to bring the defendant into court to answer the charge brought against him.* The defendants in *McMann v. Richardson,* for example, could surely have been brought to trial without the use of the allegedly coerced confessions, and even a tainted indictment of the sort alleged in *Tollett* could have been "cured" through a new indictment by a properly selected grand jury. In the case at hand, by contrast, the nature of the underlying constitutional infirmity is markedly different. Having chosen

> originally to proceed on the misdemeanor charge in the District Court, the State of North Carolina was, under the facts of this case, simply precluded by the Due Process Clause from calling upon the respondent to answer to the more serious charge in the Superior Court. Unlike the defendant in *Tollett*, Perry is not complaining of "antecedent constitutional violations" or of a "deprivation of constitutional rights that occurred prior to the entry of the guilty plea." 411 U.S. at 266, 267. Rather, *the right that he asserts and that we today accept is the right not to be haled into court at all upon the felony charge.* The *very initiation of the proceedings* against him in the Superior Court thus operated to deny him due process of law.
>
> *Last Term in Robinson v. McNeil, 409 U.S. 505, in explaining why the Double Jeopardy Clause is distinctive, the Court noted that "its practical result is to prevent a trial from taking place at all, rather than to prescribe procedural rules that govern the conduct of a trial."* Id., at 509. While our judgment today is not based upon the Double Jeopardy Clause, we think that the quoted language aptly describes the due process right upon which our judgment *is* based. The "practical result" dictated by the Due Process Clause in this case is that North Carolina simply could not permissibly require Perry to answer to the felony charge. That being so, it follows that his guilty plea did not foreclose him from attacking his conviction in the Superior Court proceedings through a federal writ of habeas corpus.

417 U.S. at 30-31 (emphasis added).

In *Menna v. New York*, 423 U.S. 61 (1975), this same reasoning was applied to a straight forward double jeopardy claim. There the petitioner had refused both to answer questions put to him by a grand jury and to obey a court order to testify before the same grand jury. His failure to

obey the court order was punished as contempt with a 30-day jail term, which he served. Over a year later he was indicted for refusing to answer questions before the grand jury. He raised his double jeopardy claim in the trial court but was overruled and subsequently pled guilty to the indictment. On appeal he again claimed that the Double Jeopardy Clause barred the prosecution of the indictment, but the New York Court of Appeals found that this claim had been waived by his counseled plea of guilty. The Supreme Court, in a very short opinion, granted certiorari and reversed and remanded the case for determination on the merits of the double jeopardy claim. The *per curiam* opinion states simply:

> Where the State is precluded by the United States Constitution from haling a defendant into court on a charge, federal law requires that a conviction on that charge be set aside even if the conviction was entered pursuant to a counseled plea of guilty. *Blackledge v. Perry*, 417 U.S. 21, 30 (1974).

423 U.S. at 62.

If the Court had been content to rest with that statement, *Menna* could easily be seen to be dispositive of the present controversy. However, at the end of a substantial footnote the Court hedged its *Menna* holding:

> We do not hold that a double jeopardy claim may never be waived. We simply hold that a plea of guilty to a charge does not waive a claim that – judged on its face – the charge is one which the State may not constitutionally prosecute.

423 U.S. at 62, 63 n. 2. This statement has been used by some courts to effectively deprive *Menna* of any force whatsoever. For example, *United States v. Herzog*, 644 F.2d 713, 716 (8th Cir.), *cert. denied* 451 U.S. 1018 (1981), involving habeas proceedings by a criminal defendant seeking to withdraw several guilty pleas, states that "dou-

ble jeopardy is a personal defense and not jurisdictional . . . [and] usually cannot, after conviction, be raised" in habeas proceedings. This is a mere recitation of the former rule which appears to fly directly in the face of the theory of the Double Jeopardy Clause set forth in *Blackledge* and *Menna*.

Citing *Herzog*, the government suggests that the present case is distinguishable from *Menna* because there the defendant first raised his double jeopardy claim in the trial court before pleading guilty, while here Broce and his attorneys made no mention of the right until more than a year after the guilty pleas were entered. The *Menna* court, however, did not indicate in any way that its decision was premised upon the fact that the double jeopardy issue in that case was raised prior to the guilty plea. Instead, it focused on the fact that if the indictment violated the Double Jeopardy Clause the *State* was precluded by the Constitution from forcing the defendant into court in the first place. Indeed, *Blackledge*, upon which *Menna* is firmly based, shows conclusively that claims relevant to "the very power of the state to bring the defendant into court" can be raised after a guilty plea, even, *Herzog* notwithstanding, in habeas corpus proceedings.

We feel that a more appropriate reading of *Menna* would find the Supreme Court's intent to be that while it is possible for a criminal defendant to waive his double jeopardy rights, a mere plea of guilty, without more, is not such a waiver. *Cf. United States v. Gaertner*, 583 F.2d 308, 311 (7th Cir. 1978). ("upon review of *Blackledge* . . . and *Menna* . . . it is *certain* that the preclusive effects of guilty pleas do not apply to constitutional claims which go 'to the very power of the State to bring the defendant into court to answer the charge brought against him.' *Blackledge v. Perry, supra*, 417 U.S. at 30 . . ." (emphasis added)); *Green v. Estelle*, 524 F.2d 1243, 1244 (5th Cir. 1975) ("*Menna* . . . holds that where a valid double

jeopardy claim would preclude a constitutional prosecution, a plea of guilty to that charge does not extinguish the double jeopardy claim."). The distincition between so-called "personal rights" and "jurisdictional defects" employed in *Herzog* and in this court's own former opinions has not been endorsed by the Supreme Court and is clearly inadequate to accommodate the "distinctive" character of the Double Jeopardy Clause. *Blackledge*, 417 U.S. at 31; *Robinson v. Neil*, 409 U.S. 505, 509 (1973).[3]

This understanding of *Menna* is reinforced when the portion of footnote 2 in that opinion, quoted above and seized upon by the *Herzog* court to justify its errant interpretation, is read in conjunction with the preceding portion of the footnote:

> Neither *Tollett v. Henderson*, 411 U.S. 258 (1973), nor our earlier cases on which it relied, *e.g., Brady v. United States*, 397 U.S. 742 (1970), and *McMann v. Richardson*, 397 U.S. 759 (1970), stand for the proposition that counseled guilty pleas inevitably "waive" all antecedent constitutional violations. If they did so hold, the New York Court of Appeals might be correct. However, in *Tollett* we emphasized that waiver was not the basic ingredient of this line of cases, 411 U.S., at 266. The point of these cases is that a counseled plea of guilty is an admission of factual guilt so reliable that, where voluntary and intelligent, it *quite validly* removes the issue of factual guilt from the case. In most cases, factual guilt is a sufficient basis for the State's imposition of punishment. A guilty plea, therefore, simply renders irrelevant those constitutional violations not logically inconsistent

[3] *Cf.* Fed.R.Crim.P. 12(b) and the corresponding *Note of the Advisory Committee on Rules*, providing that objections based on former jeopardy, like those pleading lack of jurisdiction, are not waived by failure to raise them before trial as many other objections based upon constitutional rights are.

> with the valid establishment of factual guilt and which do not stand in the way of conviction, if factual guilt is validly established. Here, however, the claim is that the State may not convict petitioner no matter how validly his factual guilt is established. The guilty plea, therefore, does not bar the claim.

423 U.S. at 62, 63 n. 2 (emphasis in original)[4]

In point of fact, the Supreme Court has never endorsed a "waiver" theory with regard to double jeopardy rights, even when holding, for example, that the Double Jeopardy Clause "does not relieve a defendant from the consequences of his voluntary choice" to "seek termination of the proceedings against him on a basis unrelated to factual guilt or innocence," *i.e.*, preindictment delay, so that the government was entitled to appeal the trial court's granting of the requested dismissal. *United States v. Scott*, 437 U.S. 82, 98, 99 (1978). In *Green v. United States*, 355 U.S. 184 (1957), a criminal defendant was indicted and tried for first degree murder. The jury, after instruction on the lesser included offense, found the defendant guilty only of second degree murder, and its verdict was silent as to the first degree charge. On appeal the conviction was reversed and remanded for a new trial. On remand the defendant, despite his plea of former jeopardy, was again tried for first degree murder, instead of second degree, was convicted and sentenced to death. The Supreme Court's opinion reversing the second conviction contains the following discussion:

> [T]he Government contends that Green "waived" his constitutional defense of former jeopardy to a second prosecution on the first degree murder charge by making a *successful* appeal of his improper conviction of second degree murder. We cannot accept this

[4] In the present case, defendants in fact continue to admit their guilt, and any other factual issues involved in their pleas to the second indictment are actually irrelevant. The trial court's reasoning to the contrary will be discussed in more detail later.

paradoxical contention. "Waiver" is a vague term used for a great variety of purposes, good and bad, in the law. In any normal sense, however, it connotes some kind of voluntary knowing relinquishment of a right. *Cf. Johnson v. Zerbst,* 304 U.S. 458. When a man has been convicted of second degree murder and given a long term of imprisonment it is wholly fictional to say that he "chooses" to forego his constitutional defense of former jeopardy on a charge of murder in the first degree in order to secure a reversal of an erroneous conviction of the lesser offense. In short, he has no meaningful choice. And as Mr. Justice Holmes observed, with regard to this same matter in *Kepner v. United States*, 195 U.S. 100, at 135: "Usually no such waiver is expressed or thought of. Moreover, it cannot be imagined that the law would deny to a prisoner the correction of a fatal error, unless he should waive other rights so important as to be saved by an express clause in the Constitution of the United States."

355 U.S. at 191, 192 (emphasis in original).

In the present case, the offenses and punishment involved are much less serious than those involved in *Green.* Nonetheless, there is in this case, too, little evidence of a voluntary knowing relinquishment of the double jeopardy right. As was said in *United States v. Anderson,* 514 F.2d 583, 586 (7th Cir. 1975), decided before *Menna*, "[a] double jeopardy defense is normally not the type of claim that would be foregone for some strategic purpose." In this case the defendants did not receive a copy of the second indictment until nearly four days after it was filed and pled guilty to it immediately thereafter. The record is devoid of any indication that, prior to these pleas, a waiver of double jeopardy rights was discussed or bargained for by the government or was in any way brought to the attention of Mr. Broce or his counsel. The trial court's cautionary

remarks to Mr. Broce prior to accepting his pleas reminded him of a full catalog of constitutional rights with the notable exception that no reference whatsoever was made to the protection created by the Double Jeopardy Clause. The very fact that defendants did not raise their double jeopardy claim until after the *Beachner* opinion was filed is some indication that prior to the guilty pleas Mr. Broce and his counsel had not even considered the matter. The record in fact contains, in the uncontradicted affidavit of the attorney who represented the defendants when they pled guilty and later at their sentencing, positive evidence that the question of double jeopardy was not considered by defendants prior to their pleas. In short, being mindful of the rule that " 'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and that we 'do not presume acquiescence in the loss of fundamental rights,' " *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) *quoting Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937) and *Ohio Bell Telephone Co. v. Public Utilities Comm'n.*, 301 U.S. 292, 307 (1937), this court is compelled to conclude that, with respect to the defendants' double jeopardy rights, there has been no "intentional relinquishment or abandonment of a known right or privilege." *Zerbst*, 304 U.S. at 464.

The trial court below found yet another seeming loophole in the *Menna* opinion. Focusing again on the qualifying footnote remark quoted above, the district court noted that the last sentence limited the force of *Menna* to allow raising a double jeopardy claim after a guilty plea only against an indictment that "judged on its face" was violative of the Double Jeopardy Clause. The trial court then observed that in contrast to the indictment in *Menna* "the challenged second indictment in the instant case (No. 82-20011-01) does not *on its face* seek to punish the defendants for the same conduct for which they were charged in the previous indictment (No. 81-20119-01)."

slip op. at 8 (Nov. 18, 1983) (emphasis in original). Concluding that the precise issue before it had never been expressly decided by the Supreme Court, the trial court followed the holding of *Kerrigan v. United States*, 644 F.2d 47 (1st Cir. 1981) to find that a guilty plea bars a criminal defendant from demonstrating a valid double jeopardy claim based on any version of the facts differing from that stated in the indictments against him. We find this interpretation of *Menna*, and of the United States Constitution, and its application to the present cases to be deficient in several respects which we will examine in turn.

First, we consider the trial court's finding that the present indictments on their faces allege distinct criminal conspiracies. For this purpose it will be necessary to consider the actual language of these indictments in some detail. Without quoting, it may be noted that the following pairs of numbered paragraphs from the two indictments are in fact identical:

First Indictment Case No. 81-20119-01	Second Indictment Case No. 82-20011-01
¶ 1(a) & (b)	¶ 1(a) & (b)
¶ 2	¶ 2
¶ 3	¶ 3
¶ 4	¶ 4
¶ 7	¶ 6
¶ 8	¶ 7
¶ 9	¶ 8
¶ 10	¶ 9

In addition, section VI of each indictment, consisting of paragraph 13(a)-(d) in the first case and paragraph 14(a)-(d) in the second, which describes the "Effects" of the alleged conspiracies, differ only in that where the first indictment refers to a "Federal-Aid highway project" the second refers to a "public highway construction project."

The following language appearing in the "Offense Charged" section is also identical in both indictments. The

blanks denote differences in paragraph numbers, project numbers, dates, the above-mentioned substitution of "public highway construction" for "Federal-Aid highway," and finally, a single sub-paragraph differing in substance:

> __. The aforesaid combination and conspiracy consisted of an agreement, understanding and concert of action among the defendants and co-conspirators, the substantial terms of which were:
>
> (a) to allocate to Broce Construction Co., Inc.—Project No. __ let by the State of Kansas on _____; and
>
> (b) To submit collusive, noncompetitive, and rigged bids to the State of Kansas in connection with the above-referenced _____ project.
>
> __. For the purpose of forming and effectuating the aforesaid combination and conspiracy, the defendants and co-conspirators have done those things which, as hereinbefore charged, they have combined and conspired to do, including:
>
> (a) Discussing the submission of prospective bids on the above-described project let by the State of Kansas, Project No. _____.
>
> (b) Designating the successful low bidder on the above-referenced public highway construction project;
>
> (c) Submitting intentionally high or complementary bids on the above-referenced _____ project on which Broce Construction Co., Inc. had been designated as the successful low bidder;
>
> (d) Submitting bid proposals on the above-referenced _____ project containing false, fictitious and fraudulent statements and entries; and
>
> (e) _____.

The missing subparagraph (e) in the first indictment contains the significant allegation: "Discussing the submission of prospective bids on other projects let by the State

of Kansas on April 25, 1978." This clearly indicates that the conspiracy prosecuted by the first indictment encompassed more Kansas highway projects than No. 23-60-RS-1080(9). In fact, the "Statement of Facts in Support of Pleas" appended by the government to the plea agreements filed in these cases on February 8, 1982, reveals that the other projects discussed in conjunction with the rigging of bids on Project No. 23-60-RS-1080(9) were *not* all let on the same date, April 25, 1978. Page two of that "Statement of Facts" contains the following sentence:

> James Carlile told defendant, Ray Broce, that he believed that Carlile Asphalt should be the low bidder on the Meade County project [i.e. No. 23-60-RS-1080(9)] and that Broce Construction Co. should be the low bidder on a Gray County project which was going to be let at the *next* State Highway letting.

(emphasis added). Though this "Statement of Facts" is not technically a part of the indictment, it was a part of the record before the court below at the time the guilty pleas were accepted and is the government's own account of what the defendants were admitting by their pleas. It would take a singularly myopic view of the indictment to completely ignore this statement when determining what conspiracy the indictment alleges on its face. Clearly the indictment does *not* state that the conspiracy involved in the rigging of Project No. 23-60-RS-1080(9) concerned *only* that project or even just the April 25, 1978, bid letting, unless we are to presume that the government chose the indictment language in a deliberate attempt to misstate the facts.

Finally, the following quoted paragraph is the key passage of the first indictment which states the essential elements of the crime alleged:

> 11. Beginning sometime in or about April, 1978, *and continuing thereafter, the exact dates being to*

> *this grand jury unknown*, in the District of Kansas, Ray C. Broce, Gerald R. Gumm and Broce Construction Co., Inc., defendants herein, *and others known and unknown*, entered into and engaged in a combination and conspiracy to suppress and eliminate competition for the construction of Project No. 23-60-RS-1080(9) let by the State of Kansas on April 25, 1978, which contract involved construction work on a Federal-Aid highway in the State of Kansas, in unreasonable restraint of the above-described interstate trade and commerce in violation of Title 15, United States Code, Section 1, commonly known as the Sherman Act.

(emphasis added). The second indictment differs only in the following respects:

> 1. The first date is changed from April, 1978, to July, 1979, and the second from April 25, 1978, to July 17, 1979;
>
> 2. The name Gerald R. Gumm does not appear in the second indictment even though the government's "Statement of Facts" clearly indicates that he had an active role in that bid-rigging as well;
>
> 3. Project No. 23-60-RS-1080(9) is replaced by Project No. KRL 29-2(26);
>
> 4. The word "public" is substituted for the first indictment's "Federal-Aid;"
>
> 5. The paragraph is numbered "10."

The portions of the first indictment's version underscored above reveal the vague and indefinite character of the indictments. The indictments state approximate beginning dates for the conspiracies but give no conclusion dates, stating merely that they were "continuing." Nothing in the first indictment would preclude a finding that the conspiracy alleged therein was "continuing" throughout the period encompassed by the second indictment. The indictments do not even specify with

definiteness who was involved in the alleged conspiracies. Nothing would preclude a finding that all of the people participating in the first alleged conspiracy were also participants in the second. And finally, as noted previously, there is nothing in the first indictment to indicate that the agreement and conspiracy decribed therein with regard to Project No. 23-60-RS-1080(9) did not also emcompass other projects and other bid-letting dates. Indeed, nothing in either indictment is definitely inconsistent with the view that the conspiracies they allege are in fact identical, and, further, are identical with the ongoing conspiracy to rig bids, extending over a period exceeding a quarter century, that was found by Judge Saffels in *Beachner*, 555 F.Supp. at 1277-1279.[5]

In contrast, in *Kerrigan v. United States, supra,* 644 F.2d at 48 n. 1 and n. 2, relied upon by the court below, the indictments are much less vague and it is easier to make the case that they do in fact alleged distinguishable conspiracies. First of all, the Kerrigan indictments give a specific month *and date* for both the beginning and the ending of the conspiracies alleged. There is no fudging of the time periods by use of the "exact dates being to this grand jury unknown" language found in both of the present indictments. Further, the time periods alleged for each con-

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[5] It is significant that Judge Saffels in his opinion stated:

> Although witnesses denied any overall agreement or understanding or participation in a single conspiracy, there can be no doubt that bid rigging *was a way of life* in the industry in Kansas. The court cannot imagine that any contractor was not aware of the prevailing practice or unfamiliar with the common jargon and mechanics of rigging a bid.

555 F.Supp. at 1778. In sentencing Mr. Broce, Judge O'Connor below stated:

> Specifically, as to the offenses in question here, though, it would appear that this defendant and this company played a significant role in making big rigging *a way of life* in the highway construction business in this state.

(ROA 201).

spiracy overlap by only one day. Again, there is no vagueness as to who was involved in the *Kerrigan* conspiracies. Although two of the three persons named in the first indictment also were named by the second indictment, there is no catch-all "and others known and unknown" phrase. Lastly, although we do not endorse the view that a difference in overt acts alleged by itself compels a finding that multiple indictments do not violate the double jeopardy clause, *see United States v. Mallah*, 503 F.2d 971, 985 (2nd Cir. 1974), it is pertinent that the *Kerrigan* indictments each refer to the interstate transport of a single lot and type of stolen goods and contain no hints, as the first indictment in the present case does, that other illegal acts were discussed or bargained for in connection with the ones specifically alleged. Based on these considerations, we find, without approving of the result reached by the *Kerrigan* court upon the facts before it, that that case must be distinguished from the present one.

We also are disturbed by the *Kerrigan* court's suggestion that a criminal defendant who pleads guilty to multiple indictments may not "later contest the factual and theoretical foundations of the indictment to which he pleaded, so as to show that, in fact, he committed only a single offense." 644 F.2d at 49. The *Menna* footnote quoted above nowhere mentions that the theoretical or, for that matter, factual *foundations* of an indictment are admitted by a guilty plea. Instead, the *Menna* footnote addresses only the questions of factual *guilt*. Here, indeed, the defendants have admitted the fact that they are guilty of conspiracy to rig highway construction bids – and continue to do so on appeal, but, as in *Menna*, their "claim is that the [government] may not convict [them] no matter how validly [their] factual guilt is established." 423 U.S. at 62, 63 n.2. See *Abney v. United States*, 431 U.S. 651, 659 (1977) ("the very nature of a double jeopardy claim is such that it is collateral to, and separable from, the principal

issue at the accused's impending criminal trial, i.e., whether or not the accused is guilty of the offense charged.") We decline to believe that their right to raise this question is conditioned by the government's choice of words in its indictments.

This case is more appropriately seen in relation to the following comments made nearly half a century ago in *Short v. United States*, 91 F.2d 614, 624 (4th Cir. 1937):

> Blanket charges of "continuing" conspiracy with named defendants and with "other persons to the grand jurors unknown" fulfill a useful purpose in the prosecution of crime, but they must not be used in such a way as to contravene constitutional guaranties. If the government sees fit to send an indictment in this general form charging a continuing conspiracy for a period of time, it must do so with the understanding that upon conviction or acquittal further prosecution of that conspiracy during the period charged is barred, and that this result cannot be avoided by charging the conspiracy to have been formed in another district where overt acts in furtherance of it were committed, or by charging different overt acts as having been committed in furtherance of it, or by charging additional objects or the violation of additional statutes as within its purview, if in fact the second indictment involves substantially the same conspiracy as the first. And, if two indictments charging continuing conspiracy and covering the same period in whole or in part are drawn with blanket coverage "with other persons to the grand jurors unknown," a plea of former jeopardy should be submitted to the jury if there is proof that the same partnership in criminal purposes is prosecuted by both, even though the appearance of identity of offenses may have been avoided in the indictment by charging a different place of conspiracy, or by joining additional defendants, or by charging different overt acts, or by charging the violation of additional statutes as being among the objects of the conspiracy. The constitutional provision against double jeopardy is a matter of substance and may not be thus nullified by the mere forms of criminal pleading.

Though we disagree with the *Short* court's indication that the question of double jeopardy is one for a jury to decide, *cf. Pryor v. Rose,* 724 F.2d 525, 528 (6th Cir. 1984), we agree with its view that the government cannot be allowed to evade the Double Jeopardy Clause by using vague indictments, facially distinguishable only by their reference to different overt acts, here, the submission of rigged bids on different construction projects.

In *Sanabria v. United States*, 437 U.S. 54 (1978), the Supreme Court stated:

> "The Double Jeopardy Clause is not such a fragile guarantee that . . . its limitations [can be avoided] by the simple expedient of dividing a single crime into a series of temporal or spatial units," *Brown v. Ohio*, 432 U.S. at 169, or, as we hold today, into "discrete bases of liability" not defined as such by the legislature. See *id.* at 169 n. 8.

437 U.S. at 72. Although *Sanabria* did not involve issues or circumstances strictly comparable to those at hand, the Court's reminder is well taken in the present context. We believe that the *Menna* court never intended to suggest that the Constitution's protection against double jeopardy is such a "fragile guarantee" that it could be taken from a defendant who has pled guilty to an indictment merely because that indictment differs from a previous indictment through the government's purely cosmetic manipulation of the facts alleged.

We hold that where a criminal defendant raises a nonfrivolous claim that he has been haled into court in viola-

tion of the Double Jeopardy Clause on a charge which does not on its face show clearly, indubitably and without any ambiguity that the government's prosection of that charge was constitutionally permissible, that defendant is entitled to a decision on the merits of his double jeopardy claim unless it is demonstrated that he has made an informed and intentional relinquishment specifically of his rights under the Double Jeopardy Clause of the United States Constitution. This right is unaffected by any plea to the challenged charge.

While these cases have been pending before us, we have affirmed Judge Saffels' *Beachner* findings as not clearly erroneous. *United States v. Beachner Const. Co. Inc.*, 729 F.2d 1278 (1984). Judge O'Connor, the trial judge below in the instant cases, sat with us on that appeal. Further highlighting the close connection between these cases and *Beachner*, before Judge O'Connor issued his opinion on the present cases below, both the defendants and the government entered a stipulation into this record that Judge O'Connor could consider, for the purposes of his ruling on the defendants' motion to vacate, the record made by Judge Saffels in the evidentiary hearing on the *Beachner* double jeopardy claim.

Given their broadest interpretation, the findings of fact made in *Beachner* and affirmed by this court would seem to imply that there was never more than one conspiracy engaged in by any Kansas highway contractor. We take the government's stipulation below that the record of the evidentiary hearing in *Beachner* could be used in deciding the motion on the defendants' double jeopardy claims in this case to be an admission that, apart from the issue of the effect of the guilty pleas entered herein, this case does not present a significantly different set of factual circumstances with respect to the actual existence of a Double Jeopardy Clause infringement. Facts therefore now

appearing in this record lead to the conclusion that the defendants have been twice punished for their participation in a single continuing conspiracy. Because their double jeopardy rights have been so violated, the judgment and sentence entered under the second indictment below were illegal and the defendants' Rule 35(a) motion must be granted.

Accordingly, the judgment and sentence entered by the district court on March 15, 1982 in case No. 83-2558 is hereby vacated. There being no contest of the judgment and sentence in case No. 83-2559, that appeal is dismissed.

Judge Seth will file a separate opinion.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

No. 81-20119-01

UNITED STATES OF AMERICA, PLAINTIFF,

v.

BROCE CONSTRUCTION CO., INC., ET AL., DEFENDANTS.

No. 82-20011-01

UNITED STATES OF AMERICA, PLAINTIFF,

v.

BROCE CONSTRUCTION CO., INC., ET AL., DEFENDANTS.

[Filed: Nov. 18, 1983]

MEMORANDUM AND ORDER

This matter is presently before the court on the defendants' motion, pursuant to Fed. R. Crim. P. 35(a), to vacate the judgment and sentence of the court entered March 15, 1982, in Case No. 82-20011-01, on the ground that the judgment and sentence constitute a violation of the double jeopardy clause of the Fifth Amendment of the United States Constitution.

Background

On November 17, 1981, the defendants were charged by a two-count indictment in Case No. 81-20119-01, for violations of federal antitrust laws (15 U.S.C. §1)

and the mail fraud statute (18 U.S.C. §1341) relating to State of Kansas Highway Project No. 23-60-RS-1080(9) let by the state of Kansas on April 25, 1978. Count One of the indictment, concerning the antitrust charge, alleged in part as follows:

> Beginning sometime in or about April, 1978, and continuing thereafter, the exact dates being to this grand jury unknown, in the District of Kansas, Ray C. Broce, Gerald R. Gumm and Broce Construction Co., Inc., defendants herein, and others known and unknown, entered into and engaged in a combination and conspiracy to suppress and eliminate competition for the construction of Project No. 23-60-RS-1080(9) let by the State of Kansas on April 25, 1978, which contract involved construction work on a Federal-Aid highway in the State of Kansas, in unreasonable restraint of the above-described interstate trade and commerce in violation of Title 15, United States Code, Section 1, commonly known as the Sherman Act.

Count Two of the indictment, concerning the mail fraud charge, alleged in part:

> Beginning sometime in or about April, 1978, and continuing thereafter, the exact dates being to this grand jury unknown, in the District of Kansas, Ray C. Broce, Gerald R. Gumm and Broce Construction Co., Inc., defendants herein, and others known and unknown, devised and intended to devise a scheme and artifice to defraud the State of Kansas and the United States of America . . .

On February 4, 1982, the defendants were charged in a second indictment, Case No. 82-20011-01, with a one-count violation of the antitrust laws relating to another Kansas highway project. The indictment alleged, in part:

> Beginning sometime in or about July, 1979, and continuing thereafter, the exact dates being to this grand jury unknown, in the District of Kansas, Ray

C. Broce and Broce Construction Co., Inc., defendants herein, and others known and unknown, entered into and engaged in a combination and conspiracy to suppress and eliminate competition for the construction of Project No. KRL 29-2(26) let by the State of Kansas on July 17, 1979, which contract involved construction work on a public highway in the State of Kansas, in unreasonable restraint of the above-described interstate trade and commerce in violation of Title 15, United States Code, Section 1, commonly known as the Sherman Act.

On February 8, 1982, defendant Broce Construction Co., Inc., entered a plea of guilty to the antitrust charge in Case No. 81-20119-01 and the antitrust charge in Case No. 82-20011-01. Defendant Ray C. Broce entered pleas of guilty to both counts in Case No. 81-20119-01, and to the one-count antitrust charge in Case No. 82-20011-01.

The defendants appeared before this court for sentencing on March 15, 1982. The court sentenced defendant Broce Construction Co., Inc., to a fine of $750,000.00 on the antitrust count in Case No. 81-20119-01, and $750,000.00 on the antitrust count in Case No. 82-20011-01. In Case No. 81-20119-01, defendant Ray C. Broce was sentenced to two years imprisonment and a $50,000.00 fine on the antitrust count, and to two years imprisonment, concurrent with the antitrust count, and a $1,000.00 fine on the mail fraud count. In Case No. 81-20011-01, Mr. Broce was also sentenced to two years imprisonment, concurrent with the sentence in Case No. 81-20119-01, plus a $50,000.00 fine. Defendant Ray C. Broce paid his personal fines on June 2, 1982. Defendant Broce Construction Co., Inc., paid $500,000.00 of its fine on December 30, 1982. Mr. Broce began serving his sentence on May 3, 1982, and is presently imprisoned. At no time prior to the filing of the present motion have the defendants raised a claim that their sentences were in violation of the double jeopardy clause.

The defendants' recent double jeopardy claim was inspired by the January 31, 1983 Memorandum and Order by Judge Dale E. Saffels of this court, in another case involving bidrigging in Kansas highway construction projects, *United States v. Beachner Construction Co., Inc., et al.*, No. 82-20076-01. Beachner Construction Co., Inc., was indicated on February 4, 1982, for a violation of the Sherman Antitrust Act and a mail fraud violation. Both charges related to a Kansas highway project let by the state of Kansas on February 7, 1980. Robert Beachner was subsequently indicted for the same alleged offenses. The case proceeded to trial on May 3, 1982 ("*Beachner I*"). By a verdict rendered on May 7, 1982, a jury acquitted both defendants of the conspiracy and mail fraud charges.

On November 16, 1982, another indictment was returned by the grand jury, naming Beachner Construction Co., Inc., and Jerry Beachner as defendants. This indictment ("*Beachner II*") contained three counts alleging violations of §1 of the Sherman Act, and three counts alleging mail fraud violations. Judge Saffels found the *Beachner I* and *Beachner II* indictments to be identical, with the exception that *Beachner II* named Jerry Beachner rather than Robert Beachner, and that *Beachner II* specified three different highway projects.

In *Beachner II*, Beachner Construction Co., Inc., moved to dismiss the November 16, 1982 indictment, alleging *inter alia* double jeopardy and collateral estoppel. Following an evidentiary hearing, the court entered its January 31, 1983 Memorandum and Order, in which it concluded that the conspiracies charged in *Beachner I* and *Beachner II* were merely separate parts of a single larger and ongoing bid-rigging conspiracy that had been continuing for several years. Accordingly, Judge Saffels granted Beachner Construction Co., Inc.'s motion to dismiss.

Discussion

The defendants in the instant case, Broce Construction Co., Inc., and Ray C. Broce, contend that in light of Judge Saffels' decision in *Beachner II*, the judgment and sentence in Case No. 82-20011-01 constitutes a violation of the double jeopardy clause because it sentenced the defendants on two separate highway projects, as separate conspiracies, although they were both part of a single overall conspiracy to rig bids on Kansas highway construction projects. In addition, Broce Construction Co., Inc., contends that the total of 1.5 million dollars in fines imposed by the court was illegal because it exceeded the legal penalty of one million dollars per violation, as prescribed by 15 U.S.C. §1.

The defendants contend that in light of Judge Saffels' *Beachner II* ruling, they were guilty of only one bid-rigging offense—a single conspiracy—rather than two. The defendants thus allege that the sentence imposed by the court violates the double jeopardy clause on the ground of multiplicity in that it punishes them twice for a single offense.

It is certainly clear that the double jeopardy clause does protect a defendant against multiplicity of punishment. In *North Carolina v. Pearce,* 395 U.S. 711, 717 (1969), the Court stated:

> That guarantee [against double jeopardy] has been said to consist of three separate constitutional protections. It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. *And it protects against multiple punishments for the same offense.* . . .
> (Footnotes omitted) (emphasis added).

The defendants thus contend that they should be entitled to take advantage of Judge Saffels' *Beachner II* ruling because a Rule 35(a) motion can be raised "at any

time." Although it is the general rule that a Rule 35(a) motion can be raised at any time [*Heflin v. United States*, 358 U.S. 415 (1959); *United States v. Golay*, 560 F.2d 866, 870 (8th Cir. 1977)], the government argues that the defendants waived their double jeopardy claim because it was not timely raised and because the defendants pleaded guilty to two separate conspiracies. The issue in the case is therefore whether a plea of guilty to counts alleging two separate conspiracies constitutes a waiver of a claim of double jeopardy on the ground that the defendants are being subjected to multiple punishment for a single offense.

The leading case on the question whether a guilty plea waives a claim of double jeopardy is *Menna v. New York*, 423 U.S. 61 (1975) (*per curiam*). The defendant in that case refused to answer grand jury questions and refused to obey a court order to testify before the grand jury. He was held in contempt of court and was sentenced to a 30-day term. Upon his release from serving the contempt sentence, the defendant was indicated for his earlier refusal to answer questions before the grand jury. He argued unsuccessfully that the indictment should be dismissed as a violation of the double jeopardy clause of the Fifth Amendment. When this argument was rejected, the defendant pleaded guilty to the indictment and was sentenced on the basis of that plea. The defendant then resurrected his double jeopardy claim on appeal, but the New York Court of Appeals affirmed the conviction, holding that the double jeopardy claim had been waived by the defendant's plea of guilty. The United States Supreme Court granted certiorari and held that the defendant had not waived his double jeopardy claim. The Court stated:

> a counseled plea of guilty is an admission of factual guilt so reliable that, where voluntary and intelligent, it *quite validly* removes the issue of factual guilt from the case. In most cases, factual guilt is a sufficient

basis for the State's imposition of punishment. A guilty plea, therefore, simply renders irrelevant those constitutional violations not logically inconsistent with the valid establishment of factual guilt and which do not stand in the way of conviction, if factual guilt is validly established. Here, however, the claim is that the State may not convict petitioner no matter how validly his factual guilt is established. The guilty plea, therefore, does not bar the claim. (Emphasis in original.)

We do not hold that a double jeopardy claim may never be waived. We simply hold that a plea of guilty to a charge does not waive a claim that—judged on its face—the charge is one which the State may not constitutionally prosecute. (Emphasis added.)

Id. at 62-63, n.2 (emphasis in original).

In *Menna*, even though the defendant's guilty plea admitted the facts of his offense, the indictment—*on its face*—arguably violated the double jeopardy clause by charging him a second time for the conduct that was the subject of his previous contempt conviction. Thus, the defendant's double jeopardy claim was not rendered irrelevant by his guilty plea because the indictment *on its face* sought to punish the same conduct, thereby giving rise to a possible double jeopardy violation. In contrast, the challenged second indictment in the instant case (No. 82-20011-01) does not *on its face* seek to punish the defendants for the same conduct for which they were charged in the previous indictment (No. 81-20119-01). *Menna* left unanswered the question of whether a plea of guilty to one or more counts not multiplicious on their face constitutes a waiver of a claim of double jeopardy.

Our research reveals that few courts have squarely confronted this question left unanswered by the Supreme Court in *Menna*. Although the defendants have cited two broadly-worded opinions for the proposition that a guilty

plea does not constitute a waiver of a double jeopardy claim, *United States v. Broussard*, 645 F.2d 504 (5th Cir. 1981); *Launius v. United States*, 575 F.2d 770 (9th Cir. 1978), neither of these cases involved a plea of guilty to an indictment or information that was not multiplicious on its face. In other words, the cases cited by the defendants are entirely within the scope of the rule announced in *Menna*.

The defendants point out that there is broad language in the *Launius* opinion to the effect that a waiver of a double jeopardy claim must be a " 'waiver' as defined in *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938)—the intentional relinquishment or abandonment of a known right or privilege." 575 F.2d at 772. The government, in response, has cited to a line of cases in the Eighth and Second Circuits to the effect that a claim of double jeopardy is non-jurisdictional and is waived if not timely and affirmatively pleaded. *United States v. Herzog*, 644 F.2d 713, 716 (8th Cir. 1981); *McClain v. Brown*, 587 F.2d 389, 391 (8th Cir. 1978); *United States v. Perez*, 565 F.2d 1227, 1232 (2d Cir. 1977). The Tenth Circuit apparently had not addressed the question of waiver of a double jeopardy claim. We are not convinced, however, that the waiver theories announced in either *Launius* or the *Herzog* line of cases should be applied to the facts of the instant case.

We believe that the resolution of the pending motion should be controlled by the opinion in *Kerrigan v. United States*, 644 F.2d 47 (1st Cir. 1981), which more closely resembles the facts and the resulting legal issues of the matter at bar than does any other case cited by the parties or uncovered by the court's research. Kerrigan was indicted in two separate indictments by a federal grand jury. The first indictment charged that Kerrigan conspired with others, between August 25, 1977, and September 1, 1977, to transport and to sell stolen lithographs. The sec-

ond indictment charged that Kerrigan conspired with one of his previous co-conspirators, between September 1, 1977, and September 22, 1977, to transport and to sell stolen Indian jewelry. The second indictment also charged Kerrigan with a substantive count of transporting the stolen jewelry in interstate commerce. Kerrigan pleaded guilty to the two conspiracy charges, each before a different judge, and in exchange the government dismissed the substantive count. On March 15, 1978, Kerrigan was sentenced to three years for the jewelry conspiracy and two years (consecutively) for the lithograph conspiracy. After his sentencing, Kerrigan challenged the two-year sentence on the ground that the two charges involved parts of a single conspiracy. The district court adopted the magistrate's finding that the indictments charged separate conspiracies, and rejected Kerrigan's challenge to his sentence.

On appeal, Kerrigan again asserted that there was only one conspiracy and argued, relying on *Menna* and *Launius*, that his guilty plea did not waive his right to raise the double jeopardy claim. In the opinion for the First Circuit, Judge Campbell discussed *Menna* and *Launius* at some length.

> *Menna* and *Launius* do indeed indicate that a double jeopardy claim may lie notwithstanding a guilty plea, but in neither case did the double jeopardy claim depend upon a repudiation of the allegations in the indictment to which the plea had been entered. These cases do not hold, as Kerrigan suggests, that a defendant who pleaded guilty may later contest the factual and theoretical foundations of the indictment to which he pleaded, so as to show that, in fact, he committed only a single offense. The court in *Launius* explicitly and correctly stated that "By pleading guilty appellants admitted the facts alleged in the information." [Citations omitted]. Kerrigan's claim of double jeopardy must be evaluated under the version of facts stated in the indictment, not against an alternative version of events which Kerrigan now claims is more accurate. Evaluated in this way, Kerrigan's claim is quite different from that asserted in *Launius*; far from being facially multiplicitous, as in *Launius*, Kerrigan's indictments sufficiently described two separate and distinct offenses, for which Kerrigan could be constitutionally sentenced to two separate terms of imprisonment.
>
> 644 F.2d at 49.

Judge Campbell concluded that:

> the two agreements charged related to commission of crimes which were similar but distinct. Thus, facially, it is possible to have had two conspiracies. . . . By pleading guilty, Kerrigan accepted the government's two-conspiracy allegations, and it is too late for him to try to establish something else. The factual allegations of the indictments sufficiently charge two separate conspiracies; Kerrigan is bound by these facts because of his guilty pleas; and Kerrigan has therefore not been twice placed in jeopardy for the same offense.

Id.

The similarity between the facts of the case now at bar and those of *Kerrigan* is inescapable. Defendants Ray C. Broce and Broce Construction Co., Inc., pleaded guilty to two separate indictments alleging different conspiracies beginning at different times (more than one year apart) and involving different construction projects. On their faces, the indictments alleged two distinct criminal conspiracies, and the defendants pleaded guilty to each, acknowledging the validity of the facts contained in each indictment. Accordingly, we feel compelled to adopt the First Circuit's reasoning that the defendants "accepted the

government's two-conspiracy allegations, and it is too late for [them] to try to establish something else." 644 F.2d at 49.

There remains, however, the defendants' suggestion that, notwithstanding their pleas of guilty, Judge Saffels' subsequent ruling in *Beachner II*, that there was only one agreement among Kansas contractors to rig bigs, rendered their sentences invalid and that it now "appears from the face of the indictments that but one conspiracy existed for which defendants have been twice punished." (Defendant's Reply, at 9.) In support of this theory that an intervening court decision can merge the contents of previous indictments alleging two conspiracies into a single conspiracy, the defendants cite *Smith v. United States*, 287 F.2d 270 (9th Cir. 1961).

In *Smith*, the defendant pleaded guilty to a three-count information arising out of a bank robbery. Each count charged the defendant with violating a different subsection of 18 U.S.C. §2113. After the defendant was sentenced, the Supreme Court of the United States, in another case, held that the subdivisions of 18 U.S.C. §2113 charged but one offense and that the imposition of more than one sentence was illegal. As a result, the defendant's sentence was corrected.

We are not persuaded that this line of reasoning is applicable here. *Smith v. United States* is distinguishable from the situation at bar in that the intervening decision in that case involved a question of *law*: the operation of a statute. Consequently, the Supreme Court's decision was applicable to Smith's case. Judge Saffels' finding of a single conspiracy in *Beachner II*, however, was a *factual* determination made in light of the evidence produced at an evidentiary hearing in that particular case. It is well settled that the question whether a single conspiracy or multiple conspiracies exist is a question of fact. *United States v. Elam*, 678 F.2d 1234, 1245 (5th Cir. 1982); *United States*

v. James, 576 F.2d 1121, 1126 (5th Cir. 1978); *United States v. Armedo-Sarmiento*, 545 F.2d 785, 789 (2d Cir. 1976), *cert. denied*, 430 U.S. 917 (1977); *United States v. Ippolito*, 509 F.Supp. 1205, 1208 (E.D. N.Y. 1981). Accordingly, we do not believe that at this late date the defendants should be permitted to take advantage of a factual determination that is inconsistent with the facts the defendants admitted in pleading guilty to the indictments alleging two separate conspiracies.

We do not agree with the defendants' allegation that "[t]he position of the government would effectively deprive any defendant who pleads guilty of the right to file a Rule 3[5] motion which specifically preserves this right to those who plead guilty." (Defendants' Reply, at 10.) We hold merely that where a defendant by pleading guilty admits facts that do not give rise to a double jeopardy claim, he will not later be permitted to raise a double jeopardy claim that depends upon a version of the facts different from that he has admitted.

IT IS THEREFORE ORDERED that defendants' motion to vacate be and hereby is denied. The clerk is directed to transmit copies of this Memorandum and Order to defense counsel, the Office of the Antitrust Division of the Department of Justice, and the Office of the United States Attorney.

Dated this 18th day of November, 1983, at Kansas City, Kansas.

/s/ EARL E. O'CONNOR
Earl E. O'Connor
Chief Judge

APPENDIX F

Nos. 86-2166 and 86-2202

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT,

v.

RAY C. BROCE AND RAY C. BROCE CONSTRUCTION CO., INC., DEFENDANTS-APPELLEES.

September Term – November 13, 1987.

Before the Honorable William J. Holloway, Jr., Chief Judge, Honorable Monroe G. McKay, Honorable James E. Barrett, Honorable James K. Logan, Honorable Stephanie K. Seymour, Honorable John P. Moore, Honorable Stephen H. Anderson, Honorable Bobby R. Baldock, and Honorable William H. Timbers,* Circuit Judges.

This matter comes on for consideration of plaintiff-appellant's petition for rehearing, with suggestion for rehearing en banc in the captioned appeal.

Upon consideration of the merits of the petition for rehearing, the petition is denied by the panel to whom the case was submitted. Judge Barrett voted to grant the petition for rehearing.

The petition for rehearing having been denied by the panel to whom the case was submitted, and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Fed. R. App. P. 35, the suggestion for rehearing en banc is denied.

Judge Tacha did not participate in consideration of the suggestion for rehearing en banc.

/s/ ROBERT L. HOECKER

Robert L. Hoecker
Clerk

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Criminal Nos. 81-20119-01 and 82-20011-01

UNITED STATES OF AMERICA

v.

BROCE CONSTRUCTION CO., INC., ET AL., DEFENDANTS

[Filed: Feb. 8, 1982]

PLEA AGREEMENT BETWEEN THE UNITED STATES OF AMERICA AND DEFENDANT RAY C. BROCE

The United States of America, by its attorneys, acting with the authorization of the Assistant Attorney General in charge of the Antitrust Division, United States Department of Justice, and the defendant, Ray C. Broce, by his own person and by his attorney, hereby enter into the following plea agreement pursuant to Rule 11(e)(1)(B) of the Federal Rules of Criminal Procedure.

1. Defendant, Ray C. Broce, will plead guilty to the Indictment in this case and to the Indictment, Criminal No. 82-20011-01 charging him with a violation of 15 U.S.C. § 1 in connection with Project No. KRL 29-2(26) let by the State of Kansas on July 17, 1979.

2. Defendant, Ray C. Broce, will cooperate with the government in existing and further investigations of violations of federal law by the Antitrust Division and the United States Attorneys. Defendant understands that such cooperation must be truthful, and defendant understands the consequences of the offenses of perjury (18 U.S.C. § 1621) and making false declarations in grand jury or court proceedings (18 U.S.C. § 1623).

3. Defendant, Ray C. Broce, understands that the maximum sentence under the Sherman Act, 15 United States Code, Section 1, on each count to which he has agreed to plead guilty, is a fine of $100,000 and incarceration for a period of three years; and further understands that the maximum sentence under the Mail Fraud Statute, 18 United States Code, Section 1341 is a fine of $1,000 and incarceration for a period of five years. Defendant further understands that the sentences on each of the counts in the Indictments could be imposed consecutively. With respect to the sentence, the government will recommend to the Court that a period of incarceration to be determined by the Court is the appropriate disposition of this case. Defendant recognizes that the government's sentencing recommendation is not binding on the Court. The government agrees to call defendant's cooperation to the attention of the Court, and to request that the Court recommend to the Bureau of Prisons that any period of incarceration be served at an institution to be identified at the time of sentencing. The Government agrees to recommend that any period of incarceration be served prior to the commencement of any period of incarceration imposed on co-defendant Gerald R. Gumm.

4. Defendant reserves the right to make any arguments he wishes at the time of the sentencing including bringing to the Court's attention any facts in mitigation. However, the government also reserves the right to bring to the Court's attention any facts it wishes in aggravation to justify its sentencing recommendation.

5. The government agrees that it will not further prosecute defendant for or on account of any collusion between defendant and other contractors regarding any other highway, street or airport runway construction projects let by awarding authorities within the States of Kansas and Oklahoma prior to the date of this agreement.

6. The government and defendant enter into this agreement with knowledge of the plea agreements between the government and the other defendants in this case, Broce Construction Co., Inc. and Gerald R. Gumm. Other than in those plea agreements, the government has made no other promises to or agreements with the defendant.

DATED:

/s/ RAY C. BROCE
Ray C. Broce

/s/ RICHARD J. BRAUN
Richard J. Braun

/s/ ROBERT TILTON
Robert Tilton, ESQ.
Tilton, Dillon, Beck & Crockett
1324 Topeka Blvd.
Topeka, Kansas
Attorney for Defendant
Ray C. Broce

/s/ ROBERT V. ALLEN
Robert V. Allen
Attorneys, Department of Justice
Room 2634, Everett M. Dirksen Bldg.
Chicago, Illinois 60604
Phone: 312-353-6685

STATEMENT OF FACTS IN SUPPORT OF PLEAS

In early April, 1978, the State of Kansas, Department of Transportation advertised for bids on a resurfacing project in Meade County, Kansas. The Meade County project was a federal aid secondary project, 70% funded by the Federal Highway Trust Fund. On April 25, 1978, the following bids were submitted in the project:

Broce Construction Co.	$1,072,684.15
Carlile Asphalt Co.	$1,083,120.65
Prairie States Const. Co.	$1,100,167.90
Siebert Sand Co.	$1,110,221.00
Popejoy Construction Co.	$1,110,788.81

On April 24, 1978, on the night prior to the day for submission of bids, defendant, Gerald Gumm, approached Ronald Siebert, President of Siebert Sand Co., and Siebert told Gumm that he (Siebert) was trying to set up a Cheyenne County project on the same letting to insure that he would be the low bidder, and asked Gumm to submit a complementary bid on the Cheyenne County project. In the same conversation Gumm told Siebert that Broce Construction Co. was attempting to set up the Meade County project, and asked Siebert to submit a complementary bid on the Meade County job. Siebert gave Gumm a number to stay above on the Cheyenne County project and Gumm provided Siebert with a number to stay above on the Meade County project.

Defendant, Gerald Gumm, then approached Donald Popejoy, President of Popejoy Construction Co., and asked Popejoy whether his company was interested in the Meade County project. Popejoy told Gumm that he (Popejoy) was not very interested in the job and showed Gumm the number which Popejoy Construction Co. intended to bid on the project, which was higher than the amount Broce Construction Co. intended to bid. Gumm asked Popejoy to submit his bid in that amount on the project. Popejoy stated that he would.

Defendant, Gerald Gumm, then approached Edward Berry, General Superintendent of Prairie States Construction Co., and asked Berry to submit a complementary bid on the Meade County project. Berry showed Gumm the number he intended to bid, which was already higher than the amount Broce Construction Co. intended to bid on the project. Gumm asked Berry to turn his bid in and Berry stated that he would do so.

Defendant, Ray Broce, learned that Carlile Asphalt Co. was interested in the Meade County project. Defendant, Broce, approached James Carlile of Carlile Asphalt Co., and attempted to talk Carlile out of bidding competitively on the Meade County project. James Carlile told defendant, Ray Broce, that he believed that Carlile Asphalt should be the low bidder on the Meade County project and that Broce Construction Co. should be the low bidder on a Gray County project which was going to be let at the next State Highway letting. Defendant, Broce told Carlile that that arrangement was unacceptable to Broce Construction Co. and suggested instead that Carlile take a Seward County project on the April 25, 1978 letting in return for Broce getting the Meade County project. Defendant, Broce said that he would talk to Carlile about the Gray County project at the next letting. After a substantial amount of discussion, James Carlile agreed to let Broce Construction Co. have the Meade County project in return for the Seward County project.

After defendant, Broce's conversation and agreement with James Carlile, Gerald Gumm approached James Carlile and gave Carlile a number to bid above on the Meade County project. Carlile stated that he wanted Carlile Asphalt Co. to be the second low bidder on the Meade County project and Gumm stated a number at which Carlile should be in order to be second low bidder on the project. Carlile then gave Gumm a number to stay

above on the Seward County project. Carlile Asphalt Co. had to raise its proposed bid to get above the number provided by defendant, Gerald Gumm.

The State warrant, which is the subject of Count 2 of the Indictment, was mailed to Broce Construction Co. as a result of the agreements described above. Various construction materials, including guardrail, essential to the completion of the Meade County project were shipped in interstate commerce from states other than Kansas to the job site for use in construction of the Meade County project by Broce Construction Co.

In late June, 1979, the State of Kansas, Department of Transportation, advertised for bids on a State of Kansas funded project in Barton County, Kansas. On July 17, 1979, the State received the following bids on the Barton County project:

Broce Construction Co.	$1,639,968.55
Venture Corporation	$1,659,936.26
Siebert Sand Co.	$1,737,447.75

On July 16, 1979, on the night prior to the day for submission of bids, defendant, Ray Broce, president and principal owner of Broce Construction Co., contacted Orville Spray, Jr., president of Venture Corporation, at the Ramada Inn in Topeka, Kansas. In that conversation with Orville Spray, Jr. defendant Broce stated that he wanted Broce Construction Co. to have the Barton County job. Orville Spray, Jr. told Broce that he also wanted the job for Venture Corporation. After an hour or two of discussion with defendant, Ray Broce, Orville Spray, Jr. finally agreed to let Broce Construction Co. be the low bidder on the Barton County job in return for either $75,000 or some subcontract work on the Barton County job.

After his conversation with defendant, Ray Broce, Orville Spray, Jr., was approached by Gerald Gumm, general manager of Broce Construction Co., who told

Spray the number Venture Corporation should bid on the project in order to have Venture Corporation's bid be higher than that of Broce Construction Co. Spray stated that he would submit a bid in that amount.

About a week after the letting on July 17, 1979, Orville Spray, Jr. flew to Dodge City, Kansas, and met with defendant, Ray Broce and Gerald Gumm. Neither defendant Roy Broce nor Gerald Gumm recalls this airport meeting in Dodge City. Spray stated that he would take the $75,000 instead of the subcontract and arrangements were made between Spray and defendant, Broce for Broce Construction Co. to purchase approximately 30,000 tons of sand for the Barton County project at a price one dollar higher than the market price for such sand, and for Venture Corporation to submit to Broce Construction Co. non-legitimate equipment rental invoices for a loader for nine months at $5,000 per month to obtain payment of a total of $75,000 from Broce Construction Co. to Venture Corporation. The agreed upon arrangements were thereafter carried out in full.

Guardrail and wooden posts utilized on the project and essential to the completion of the project, were shipped from sources outside the State of Kansas to the job site for use in the construction of the project. The value of these items was in excess of $7,000.

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Criminal Nos. 81-20119-01 and 82-20011-01

UNITED STATES OF AMERICA, PLAINTIFF

v.

BROCE CONSTRUCTION CO., INC., ET AL., DEFENDANTS

[Filed: Feb. 8, 1982]

PLEA AGREEMENT BETWEEN THE UNITED STATES OF AMERICA AND DEFENDANT BROCE CONSTRUCTION CO., INC.

The United States of America, by its attorneys, acting with the authorization of the Assistant Attorney General in charge of the Antitrust Division, United States Department of Justice, and the defendant, Broce Construction Co., Inc., by its attorney and by an officer, hereby enter into the following plea agreement pursuant to Rule 11(e)(1)(B) of the Federal Rules of Criminal Procedure.

1. Defendant, Broce Construction Co., Inc., will plead guilty to Count One of the Indictment in this case and to the Indictment, Criminal No. 82-20011-01, charging it with a violation of 15 U.S.C. § 1 in connection with Project No. KRL 29-2(26) let by the State of Kansas on July 17, 1979.

2. Defendant, Broce Construction Co., Inc., will cooperate with the government in existing and further investigations of violations of federal law by the Antitrust Division and the United States Attorneys. Defendant will advise those officers and agents, who may fulfill its obligation to cooperate in the government's investigations, of the consequences of the offenses of perjury (18 U.S.C. § 1621) and making false declarations in grand jury or court proceedings (18 U.S.C. § 1623).

3. Defendant, Broce Construction Co., Inc., understands that the maximum sentence under the Sherman Act, 15 United States Code, Section 1, on each count to which it has agreed to plead guilty, is a fine of $1,000,000. With respect to the sentence, the government has agreed to recommend to the Court a fine in the amount of $1,500,000. Defendant recognizes that the government's sentencing recommendation is not binding on the Court. The government agrees that it will not oppose a request by defendant to pay one-third of the fine by December 31, 1982, another one-third of the fine by December 31, 1983, and the remaining one-third of the fine by December 31, 1984. The government agrees to dismiss the remaining Count of the Indictment at the time of sentencing.

4. The government agrees to call the defendant's cooperation to the attention of the Court. Defendant reserves the right to make any arguments it wishes at the time of the sentencing including bringing to the Court's attention any facts in mitigation. However, the government also reserves the right to bring to the Court's attention any facts it wishes in aggravation to justify its sentencing recommendation.

5. The government agrees that it will not further prosecute defendant, its officers or employees for or on account of any collusion between defendant and other contractors regarding any other highway, street or airport runway

construction projects let by awarding authorities within the States of Kansas and Oklahoma prior to the date of this agreement.

6. The government and defendant enter into this agreement with knowledge of the plea agreements between the government and the other defendants in this case, Ray C. Broce and Gerald R. Gumm. Other than in those plea agreements, the government has made no other promises to or agreements with the defendant.

DATED:

/s/ RICHARD J. BRAUN
Richard J. Braun

/s/ ROBERT V. ALLEN
Robert V. Allen
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/s/ RAY C. BROCE
Broce Construction Co., Inc.
Dodge City, Kansas

/s/ KENNETH F. CROCKETT
Kenneth F. Crockett, ESQ.
Tilton, Dillon, Beck & Crockett
1324 Topeka Blvd.
Attorney for Defendant
Broce Construction Co., Inc.

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Criminal No. 82-20011

UNITED STATES OF AMERICA

v.

RAY C. BROCE AND BROCE CONSTRUCTION CO., INC.,
DEFENDANTS

[Filed: Feb. 4, 1982]

INDICTMENT

The Grand Jury charges:

I
DEFINITIONS

1. As used herein, the term:

(a) "Highway construction" means the construction, reconstruction, building or rebuilding of public roads within the State of Kansas, including, but not limited to, the building or construction of bridges, grade separation structures, concrete or asphalt paving, and the earth moving and culverting performed in connection therewith; and

(b) "Highway construction contractor" means any business or legal entity engaged, directly or indirectly, in highway construction.

II
DEFENDANTS

2. Ray C. Broce is president of Broce Construction Co., Inc. Broce Construction Co., Inc. is a corporation organized and existing under the laws of the State of Kansas with its principal place of business in Dodge City, Kansas. During the period of time covered by this Indictment, Ray C. Broce and Broce Construction Co., Inc. have engaged in the highway construction business within the State of Kansas.

3. Whenever in this Indictment reference is made to any act, deed or transaction of any corporation, such allegation shall be deemed to mean that such corporation engaged in such act, deed or transaction by or through its officers, directors, agents, employees or representatives while they were actively engaged in the management, direction, control or transaction of its business or affairs.

III
CO-CONSPIRATORS

4. Various persons and firms, not made defendants herein, participated as co-conspirators in the offense charged herein and performed acts and made statements in furtherance thereof.

IV
TRADE AND COMMERCE

5. Public highways, including the highway which is the subject of this Indictment, are part of a nationwide network of interconnecting highways over which motor vehicles move in a continuous and uninterrupted stream of interstate commerce from and through one state to another. A substantial amount of the nation's goods move in interstate commerce over these highways via truck transportation.

6. During the period of time covered by this Indictment, the Kansas Department of Transportation invited highway construction contractors to submit sealed competitive bids on highway construction projects. Such invitations are known as highway lettings and occur approximately eight times per year in Topeka, Kansas. The State of Kansas awards contracts to the lowest responsible bidder following the opening of the sealed bids by its Department of Transportation.

7. During the period of time covered by this Indictment, there was in effect a State of Kansas law which governed the awarding of public highway construction projects by the Kansas Department of Transportation. That statute provided in part:

> 68-410. All contracts for the construction, improvement, reconstruction, and maintenance of the highway system, the cost of which exceeds one thousand dollars ($1,000), except contracts between the secretary of transportation and the various counties, shall be awarded at a public letting to the lowest responsible bidder . . . .

8. During the period of time covered by this Indictment, the State of Kansas required each bidder on public highway projects to execute a bid proposal providing in part:

> In submitting this bid, the undersigned declares that they are the only person interested in the said bid; that it is made without any connection with any person or persons making another bid for the same contract; that the bid is in all respects fair and without collusion, fraud or misrepresentation.

9. During the period of time covered by this Indictment, there was a substantial, continuous and uninterrupted flow of steel, asphalt cement and other essential materials from suppliers outside of the State of Kansas to

the job sites within the State for use by highway construction contractors in the construction of public highways, including the job site of the project which is the subject of this Indictment. The activities of the defendants and co-conspirators, which are the subject of this Indictment, were within the flow of, and substantially affected, interstate commerce.

V
OFFENSE CHARGED

10. Beginning sometime in or about July, 1979, and continuing thereafter, the exact dates being to this grand jury unknown, in the District of Kansas, Ray C. Broce and Broce Construction Co., Inc., defendants herein, and others known and unknown, entered into and engaged in a combination and conspiracy to suppress and eliminate competition for the construction of Project No. KRL 29-2(26) let by the State of Kansas on July 17, 1979, which contract involved construction work on a public highway in the State of Kansas, in unreasonable restraint of the above-described interstate trade and commerce in violation of Title 15, United States Code, Section 1, commonly known as the Sherman Act.

11. The aforesaid combination and conspiracy consisted of an agreement, understanding and concert of action among the defendants and co-conspirators, the substantial terms of which were:

(a) To allocate to Broce Construction Co., Inc. Project No. KRL 29-2(26) let by the State of Kansas on July 17, 1979; and

(b) To submit collusive, noncompetitive, and rigged bids to the State of Kansas in connection with the above-referenced public highway construction project.

12. For the purpose of forming and effectuating the aforesaid combination and conspiracy, the defendants and co-conspirators have done those things which, as hereinbefore charged, they have combined and conspired to do, including:

(a) Discussing the submission of prospective bids on the above-described project let by the State of Kansas, Project No. KRL 29-2(26);
(b) Designating the successful low bidder on the above-referenced public highway construction project;
(c) Submitting intentionally high or complementary bids on the above-referenced public highway construction project on which Broce Construction Co., Inc. had been designated as the successful low bidder;
(d) Submitting bid proposals on the above-referenced public highway construction project containing false, fictitious and fraudulent statements and entries; and
(e) Discussing the payment of consideration of value to another contractor to induce that contractor to submit a noncompetitive, rigged bid on the above-referenced public highway construction project.

VI
EFFECTS

13. The aforesaid combination and conspiracy charged herein has had the following effects, among others:

(a) Prices for the public highway construction project referred to in paragraph 10 of this indictment have been fixed, maintained, and established at artificial and noncompetitive levels;

(b) Competition for the above-referenced public highway construction project has been restrained, suppressed, and eliminated;
(c) The State of Kansas has been denied the right to receive sealed competitive bids for the above-referenced public highway construction project; and
(d) The State of Kansas has been denied the benefits of free and open competition for the above-referenced public highway construction project.

VII
JURISDICTION AND VENUE

14. The aforesaid combination and conspiracy was formed and carried out, within the District of Kansas and within the jurisdiction of this Court. The aforesaid combination and conspiracy was carried out within five years preceding the return of this Indictment.

A TRUE BILL

DATED:

/s/ RICHARD J. BRAUN
Richard J. Braun

/s/ ROBERT B. ALLEN
Robert V. Allen
Attorneys, Department of Justice
Room 2634, Everett M. Dirksen Bldg.
Chicago, Illinois 60604
Phone: 312-353-6685

FOREMAN

/s/ WILLIAM F. BAXTER
William F. Baxter
Assistant Attorney General

/s/ JOSEPH H. WIDMAR
Joseph H. Widmar
Attorney, Department of Justice

/s/ JIM J. MARQUEZ
Jim J. Marquez
United States Attorney For The
District of Kansas

(It is requested that trial be held in the City of Kansas City, Kansas).

Bond fixed at: $_____

_____
United States District Court Judge

APPENDIX J

UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS

Criminal No. 81-20119-01

UNITED STATES OF AMERICA

v.

BROCE CONSTRUCTION CO., INC.,
RAY C. BROCE, AND GERALD R. GUMM, DEFENDANTS

[Filed: Nov. 17, 1981]

INDICTMENT

The Grand Jury charges:

COUNT ONE
I
DEFINITIONS

1. As used herein, the term:
   (a) "Highway construction" means the construction, reconstruction, building or rebuilding of public roads within the State of Kansas, including, but not limited to, the building or construction of bridges, grade separation structures, concrete or asphalt paving, and the earth moving and culverting performed in connection therewith;

(b) "Highway construction contractor" means any business or legal entity engaged, directly or indirectly, in highway construction; and

(c) "Federal-Aid highways" means highway construction on public highways partially financed by the federal government in accordance with the terms and conditions of Title 23 of the United States Code, Sections 101 *et seq.*, commonly known as the Federal-Aid Highway Act.

II
DEFENDANTS

2. Ray C. Broce is president and Gerald R. Gumm is general manager of Broce Construction Co., Inc. Broce Construction Co., Inc. is a corporation organized and existing under the laws of the State of Kansas with its principal place of business in Dodge City, Kansas. During the period of time covered by this Indictment, Ray C. Broce, Gerald R. Gumm and Broce Construction Co., Inc. have engaged in the highway construction business within the State of Kansas.

3. Whenever in this Indictment reference is made to any act, deed, or transaction of any corporation, such allegation shall be deemed to mean that such corporation engaged in such act, deed or transaction by or through it officers, directors, agents, employees or representatives while they were actively engaged in the management, direction, control or transaction of its business or affairs.

III
CO-CONSPIRATORS

4. Various persons and firms, not made defendants herein, participated as co-conspirators in the offense charged herein and performed acts and made statements in furtherance thereof.

IV
TRADE AND COMMERCE

5. Federal-Aid highways, including the highway which is the subject of this Indictment, are part of a nationwide network of interconnecting highways over which motor vehicles move in a continuous and uninterrupted stream of interstate commerce from and through one state to another. A substantial amount of the nation's goods move in interstate commerce over these highways via truck transportation.

6. In the development of a nationwide network of interconnecting highways, including the public highway which is the subject of this Indictment, the federal government and the State of Kansas have, to the date of this Indictment, cooperated in the financing and construction of such highways in the State of Kansas. In this connection, within the period of time covered by this Indictment, there was in existence a program for the development and improvement of highways financed and administered by the State of Kansas and the United States of America. This program was undertaken in accordance with the terms and conditions of Chapter 1 of Title 23 of the United States Code, Sections 101 *et seq.*, commonly known as the Federal-Aid Highway Act. Under this program the United States of America, through its agency, the Federal Highway Administration, furnished and furnishes, in combination with the State of Kansas, through its Department of Transportation, the funds needed to pay the costs of certain highway construction within the State of Kansas, including a portion of the highway construction which is the subject of this Indictment.

7. During the period of time covered by this Indictment, the Kansas Department of Transportation invited highway construction contractors to submit sealed competitive bids on highway construction projects. Such invitations are

known as highway lettings and occur approximately eight times per year in Topeka, Kansas. The State of Kansas awards contracts to the lowest responsible bidder following the opening of the sealed bids by its Department of Transportation.

8. During the period of time covered by this Indictment, there was in effect a State of Kansas law which governed the awarding of public highway projects by the Kansas Department of Transportation. That statute provided in part:

> 68-410. All contracts for the construction, improvement, reconstruction, and maintenance of the highway system, the cost of which exceeds one thousand dollars ($1,000), except contracts between the secretary of transportation and the various counties, shall be awarded at a public letting to the lowest responsible bidder . . . .

9. During the period of time covered by this Indictment, the State of Kansas required each bidder on public highway projects to execute a bid proposal providing in part:

> 6. In submitting this bid, the undersigned declares that they are the only person interested in the said bid; that it is made without any connection with any person or persons making another bid for the same contract; that the bid is in all respects fair and without collusion, fraud or misrepresentation.

10. During the period of time covered by this Indictment, there was a substantial, continuous and uninterrupted flow of steel, asphalt cement and other essential materials from suppliers outside of the State of Kansas to job sites within the State for use by highway contractors in the construction of public highways, including the job site of the project which is the subject of this Indictment. The activities of the defendants and co-conspirators, which are the subject of this Indictment, were within the flow of, and substantially affected, interstate commerce.

V

OFFENSE CHARGED

11. Beginning sometime in or about April, 1978, and continuing thereafter, the exact dates being to this grand jury unknown, in the District of Kansas, Ray C. Broce, Gerald R. Gumm and Broce Construction Co., Inc., defendants herein, and others known and unknown, entered into and engaged in a combination and conspiracy to suppress and eliminate competition for the construction of Project No. 23-60-RS-1080(9) let by the State of Kansas on April 25, 1978, which contract involved construction work on a Federal-Aid highway in the State of Kansas, in unreasonable restraint of the above-described interstate trade and commerce in violation of Title 15, United States Code, Section 1, commonly known as the Sherman Act.

12. The aforesaid combination and conspiracy consisted of an agreement, understanding and concert of action among the defendants and co-conspirators, the substantial terms of which were:

(a) To allocate to Broce Construction Co., Inc., Project No. 23-60-RS-1080(9) let by the State of Kansas on April 25, 1978; and

(b) To submit collusive, noncompetitive, and rigged bids to the State of Kansas in connection with the above-referenced Federal-Aid highway project.

13. For the purpose of forming and effectuating the aforesaid combination and conspiracy, the defendants and co-conspirators have done those things which, as hereinbefore charged, they have combined and conspired to do, including:

(a) Discussing the submission of prospective bids on the above-described project let by the State of Kansas, Project No. 23-60-RS-1080(9);

(b) Designating the successful low bidder on the above-referenced Federal-Aid highway project;

(c) Submitting intentionally high or complementary bids on the above-referenced Federal-Aid highway project on which Broce Construction Co., Inc. had been designated as the successful low bidder;
(d) Submitting bid proposals on the above-referenced Federal-Aid highway project containing false, fictitious and fraudulent statements and entries; and
(e) Discussing the submission of prospective bids on other projects let by the State of Kansas on April 25, 1978.

VI

EFFECTS

14. The aforesaid combination and conspiracy charged herein has had the following effects, among others:
(a) Prices for the Federal-Aid highway project referred to in paragraph 11 of this Indictment have been fixed, maintained, and established at artificial and noncompetitive levels;
(b) Competition in the construction of the above-referenced Federal-Aid highway project has been restrained, suppressed, and eliminated;
(c) The State of Kansas has been denied the right to receive sealed competitive bids for the above-referenced public highway project; and
(d) The State of Kansas and the United States have been denied the benefits of free and open compeition for the above-referenced public highway project.

VII

JURISDICTION AND VENUE

15. The aforesaid combination and conspiracy was formed and carried out, within the District of Kansas and

within the jurisdiction of this Court. The aforesaid combination and conspiracy was carried out within five years preceding the return of this Indictment.

COUNT TWO

The Grand Jury further charges:
1. Each and every allegation contained in paragraphs 1 through 3 and 6 through 9 of Count One of this Indictment is here realleged with the same force and effect as though said paragraphs were set forth in full detail.
2. Beginning sometime in or about April, 1978, and continuing thereafter, the exact dates being to this grand jury unknown, in the District of Kansas, Ray C. Broce, Gerald R. Gumm and Broce Construction Co., Inc., defendants herein, and others known and unknown, devised and intended to devise a scheme and artifice to defraud the State of Kansas and the United States of America of:
(a) Money;
(b) Their right to open and free competition in the awarding of contracts for highway construction pursuant to their lawful statutes; and
(c) Their right to have their programs for the development and improvement of highways pursuant to their lawful statutes conducted honestly, fairly, and free from craft, trickery, deceit, corruption, dishonesty, and fraud.
3. It was part of the aforesaid scheme and artifice to defraud that:
(a) Broce Construction Co., Inc. would be and was allocated Project No. 23-60-RS-1080(9), let by the State of Kansas on April 25, 1978; and
(b) Collusive, noncompetitive, and rigged bids would be and were submitted to the State of Kansas in connection with the aforesaid project.
4. On or about the date of mailing listed below, in the District of Kansas, Ray C. Broce, Gerald R. Gumm and Broce Construction Co., Inc., defendants herein, for the purpose of executing said scheme and artifice to defraud

and attempting to do so, did knowingly cause the warrant for payment (a check from the State of Kansas) listed below to be delivered by mail by the United States Postal Service, according to the directions thereon, in violation of Title 18, United States Code, Section 1341:

COUNT	SENDER	ADDRESSEE	WARRANT NO AND AMOUNT	APPROXIMATE DATE OF MAILING
2	State of Kansas Department of Transportation	Broce Construction Co., Inc. P.O. Box 580 Dodge City, Ks. 67801	5903642 $343,696.60	11-3-78

A TRUE BILL

DATED:

/s/ RICHARD J. BRAUN
Richard J. Braun
Attorney, Department of Justice
Room 2634 Everett M. Dirksen Bldg.
Chicago, Illinois 60604
(312) 353-6685

FOREMAN

/s/ WILLIAM F. BAXTER
William F. Baxter
Assistant Attorney General

/s/ JOSEPH H. WIDMAR
Joseph H. Widmar

/s/ ROBERT V. ALLEN
Robert V. Allen
Attorneys, Department of Justice

/s/ JIM J. MARQUEZ
Jim J. Marquez
United States Attorney For The
District of Kansas

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